UNITED STATES REPORTS

VOLUME 370

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1961

MAY 28 THROUGH JUNE 25, 1962
(END OF TERM)

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DEPOSITED BY THE
UNITED STATES OF AMERICA

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
FELIX FRANKFURTER, Associate Justice.*
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

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*Mr. Justice Frankfurter was absent from the bench because of illness, and he took no part in the decision of any case reported in this volume.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, FELIX FRANKFURTER, Associate Justice.

For the Second Circuit, JOHN M. HARLAN, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, EARL WARREN, Chief Justice.

For the Fifth Circuit, HUGO L. BLACK, Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, TOM C. CLARK, Associate Justice.

For the Eighth Circuit, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

April 16, 1962.

(For next previous allotment, see 369 U. S., p. v.)

TRIBUTE TO MR. JUSTICE BLACK.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 25, 1962.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE.

Mr. Solicitor General Cox addressed the Court as follows:

Mr. Chief Justice and may it please the Court: As the current Term closes, Mr. Justice Black will have completed 25 full Terms as an Associate Justice of this Court. This is a rare event in the Court's history. Although it would be inappropriate to speak at length, the members of the Bar would wish me to call attention to the event and to mention Mr. Justice Black's extraordinarily great contributions during those 25 Terms to the country, to the law, and to the Court. May I add two other things on behalf of the entire Bar: first, that we have always enjoyed, and will always value, the opportunity to appear before him and thus join in the common enterprise of administering justice for all; second, that we wish him health and good fortune to serve for many Terms to come.

THE CHIEF JUSTICE said:

Mr. Solicitor General: This is, indeed, a significant event in the life of the Court, and it is highly appropriate that you, Mr. Solicitor General, as a leader of the Bar, should initiate its recordation in today's proceedings.

We share to the fullest extent your appreciation of the great service Mr. Justice Black has rendered to our Nation, and we join your felicitous words concerning his continued service and his future happiness.

Of the 97 Justices who have been appointed to this Court, only 16 have served as long as Mr. Justice Black and none with greater fidelity or singleness of purpose. His unflagging devotion has been to the Constitution of the United States.

The importance of any period of time depends always upon its relation to other things. Abstractly, a quarter of a century in history is little more than a grain of sand in the hourglass of time, but, measured in terms of the service of one man to the well-being of a young and dynamic country such as our own, it is a long and important period of time.

It is with such a measuring stick and with affectionate regard that we measure and record in our proceedings the 25 years of service of Mr. Justice Black to this Court and our Nation.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1961.

ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE, *v.* WILLIAMS PACKING & NAVIGATION CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 493. Argued April 18, 1962.—Decided May 28, 1962.

Respondent, which is in the business of providing fishing trawlers to commercial fishermen, sued in a Federal District Court to enjoin the collection of social security and unemployment taxes claimed by petitioner to be past due. Although petitioner adduced evidence in support of his claim that there was an employment relationship, the District Court found that such taxes were not, in fact, payable and that their collection would destroy respondent's business; and it permanently enjoined their collection. *Held:* The suit for injunction was barred by § 7421 (a) of the Internal Revenue Code of 1954, and a judgment sustaining the injunction is reversed. *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, distinguished. Pp. 1–8.

291 F. 2d 402, reversed.

Assistant Attorney General Oberdorfer argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Acting Assistant Attorney General Jones, Meyer Rothwacks* and *George F. Lynch.*

George E. Morse argued the cause for respondent. With him on the briefs was *W. E. Morse.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Fearing that the District Director of Internal Revenue for Mississippi would attempt to collect allegedly past due social security and unemployment taxes for the years 1953, 1954 and 1955, respondent, in late 1957, brought suit in the District Court, maintaining that it was not liable for the exactions and seeking an injunction prohibiting their collection. The District Director, petitioner herein, made no objection to the issuance of a preliminary restraining order but resisted a permanent injunction, asserting that the provisions of § 7421 (a) of the Internal Revenue Code of 1954 barred any such injunctive proceeding. That section provides:

> "Except as provided in sections 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The exception for Tax Court proceedings created by §§ 6212 (a) and (c) and 6213 (a) was not applicable because that body is without jurisdiction over taxes of the sort here in issue. Nevertheless, on July 14, 1959, the court, relying upon *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, permanently enjoined collection of the taxes on the ground that they were not, in fact, payable and because collection would destroy respondent's business. 176 F. Supp. 168. On June 14, 1961, the Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 291 F. 2d 402. We granted certiorari to determine whether the case came within the scope of this Court's holding in *Nut Margarine* which indicated that § 7421 (a) was not, in the "special and extraordinary facts and cir-

cumstances" of that case,[1] intended to apply.[2] 368 U. S. 937.

Respondent corporation (hereinafter referred to as Williams) is engaged in the business of providing trawlers to fishermen who take shrimp, oysters and fish off the Louisiana and Mississippi coasts. It is the Government's position that these fishermen are the corporation's employees within the meaning of §§ 1426 (d)(2) and 1607 (i) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.), and §§ 3121 (d)(2) and 3306 (i) of the Internal Revenue Code of 1954. These sections specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship. As stated in *United States* v. *Silk*, 331 U. S. 704, 716, "degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required . . . are important for decision [under these statutes]." If, under the involved circumstances of this case, the fishermen were employees, respondent Williams is admittedly liable for social security and unemployment taxes for the years in question.[3]

The following facts, material to the question of the existence of the employment relationship, were established. Williams provided its boats to captains which it selected; they employed their own crews and could fire them at will, but the relationship between respondent cor-

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[1] 284 U. S., at 511.

[2] See also *Hill* v. *Wallace*, 259 U. S. 44, 62; *Allen* v. *Regents*, 304 U. S. 439, 449.

[3] See § 1410, 1939 Code, and § 3111, 1954 Code (social security taxes); § 1600, 1939 Code, and § 3301, 1954 Code (unemployment taxes).

Presumably the exceptions for fishing operations created by §§ 1426 (b)(15) and 1607 (c)(17) of the 1939 Code and by § 3306 (c)(17) of the 1954 Code do not apply because the vessels here involved were of more than 10 net tons.

poration and the fishermen was not ordinarily of short duration. The catch was generally sold to Williams which in turn resold it to the DeJean Packing Co., a partnership closely allied to Williams both by reason of integrated operation and substantially identical ownership. The proceeds, after the deduction of expenses, were divided among the captain, the crew and the boat. Williams received an additional share if it supplied the nets and rigging. It extended credit to the captains and made it possible for them to obtain credit elsewhere, and if a trip was unsuccessful and if the captain or crew members no longer continued to operate a boat, Williams absorbed the loss.

With respect to the existence of a recognized right of control by the employer, as might be expected, the testimony was in conflict. Petitioner introduced evidence to show that Williams could effectively refuse ice to boats and thus determine whether they would go out, that the boats' times of return were sometimes directed by the respondent corporation, that it could dictate the nature of the catch, and that permission was needed to sell the catch to someone other than respondent. And petitioner pointed out that both respondent and its fishermen had for other purposes represented that an employer-employee relationship existed.[4] On the other hand, the District Court here found, and the respondent now asserts, that the corporation was wholly without any right of control.

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[4] For instance, during World War II, respondent represented that the fishermen were employees for the purpose of securing occupational deferments for them. And in the course of a prior antitrust litigation, instituted against a union to which respondent's fishermen belonged, the union defended against the charge of price fixing on the ground that its members were employees. The Government, curiously, successfully maintained that an employment relationship did not exist. See *Gulf Coast Shrimpers & Oystermans Assn.* v. *United States*, 236 F. 2d 658 (C. A. 5th Cir. 1956).

Attempting to establish a basis for equitable jurisdiction, the corporation maintains that it will be thrown into bankruptcy if required to pay the entire assessment of $41,568.57. It is undisputed that Williams itself is without available funds in this amount, but the Government suggests that respondent has denuded itself of assets in anticipation of its tax liability, that DeJean's assets should be considered as belonging to respondent, and that, in any event, the respondent corporation may pay the assessment for a single quarter and then sue for a refund.

The object of § 7421 (a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes. In *Miller* v. *Standard Nut Margarine Co., supra,* this Court was confronted with the question whether a manufacturer of "Southern Nut Product" could enjoin the collection of federal oleomargarine taxes on its goods. Prior to the assessment in issue three lower federal court cases had held that similar products were nontaxable and, by letter, the collector had informed the manufacturer that "Southern Nut Product" was not subject to the tax. This Court found that "[a] valid oleomargarine tax could by no legal possibility have been assessed against . . . [the manufacturer], and therefore the reasons underlying . . . [§ 7421 (a)] apply, if at all, with little force." [5]

[5] *Id.,* at 510.

The product in issue was made only with vegetable oils. The pertinent taxing statute defined "oleomargarine" as "[a]ll substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto [a coloring material], and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter." 24 Stat. 209. The assessment was based on the argument that the statutory

Noting that collection of the tax "would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law," the Court held that an injunction could properly issue. *Id.*, at 510–511. The courts below seem to have found that *Nut Margarine* decides that § 7421 (a) does not bar suit for an injunction against the collection of taxes not due if the legal remedy is inadequate. We cannot agree.

The enactment of the comparable Tax Injunction Act of 1937, 50 Stat. 738, now, as amended, 28 U. S. C. § 1341, forbidding the federal courts to entertain suits to enjoin collection of state taxes "where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State," throws light on the proper construction to be given § 7421 (a). It indicates that if Congress had desired to make the availability of the injunctive remedy against the collection of federal taxes not lawfully due depend upon the adequacy of the legal remedy, it would have said so explicitly. Its failure to do so shows that such a suit may not be entertained merely because collection would cause an irreparable injury, such as the ruination of the taxpayer's enterprise. This is not to say, of course, that inadequacy of the legal remedy need not be established if § 7421 (a) is inapplicable; indeed, the contrary rule is well established. See, *e. g.*, *Matthews* v. *Rodgers*, 284 U. S. 521; *Miller* v. *Standard Nut Margarine Co.*, *supra*; *Dows* v. *Chicago*, 11 Wall. 108. However, since we conclude that § 7421 (a) bars any suit for an injunction in this case, we need not determine whether

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reference to "vegetable-oil annotto" was meant to bring products made with vegetable oil within the definition. The Court held that the Act was obviously designed to include only vegetable-oil coloring used in conjunction with animal-fat products; in fact, after the tax year involved, the statute had been amended to bring vegetable-oil products within the definition. See 46 Stat. 1022.

the taxpayer would suffer irreparable injury if collection were effected.

The manifest purpose of § 7421 (a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue.[6] Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.

We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with a collateral

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[6] Compare S. Rep. No. 1035, 75th Cong., 1st Sess. 2, concerning 28 U. S. C. § 1341:

"The existing practice of the Federal courts in entertaining tax-injunction suits against State officers makes it possible for foreign corporations doing business in such States to withhold from them and their governmental subdivisions, taxes in such vast amounts and for such long periods of time as to seriously disrupt State and county finances. The pressing needs of these States for this tax money is so great that in many instances they have been compelled to compromise these suits, as a result of which substantial portions of the tax have been lost to the States without a judicial examination into the real merits of the controversy."

objective of the Act—protection of the collector from litigation pending a suit for refund. And to permit even the maintenance of a suit in which an injunction could issue only after the taxpayer's nonliability had been conclusively established might "in every practical sense operate to suspend collection of the . . . taxes until the litigation is ended." *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293, 299. Thus, in general, the Act prohibits suits for injunctions barring the collection of federal taxes when the collecting officers have made the assessment and claim that it is valid. *Snyder* v. *Marks,* 109 U. S. 189, 194.

The record before us clearly reveals that the Government's claim of liability was not without foundation. Therefore, we reverse the judgment of the Court of Appeals and remand the case to the District Court with directions to dismiss the complaint.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

Syllabus.

NATIONAL LABOR RELATIONS BOARD *v.* WASHINGTON ALUMINUM CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 464. Argued April 10, 1962.—Decided May 28, 1962.

Respondent is a manufacturer subject to the National Labor Relations Act. After several of the eight nonunion employees in its machine shop had complained individually about the coldness of the shop during the winter, seven of them walked out together on an extraordinarily cold day, saying that it was "too cold to work." Respondent discharged them for violating a rule forbidding any employee to leave without permission of the foreman. The National Labor Relations Board found that they had acted in concert in protest against respondent's failure to provide adequate heat in their place of work and that their discharge violated § 8 (a) (1) of the Act by interfering with their right under § 7 to act in concert for mutual aid or protection, and it ordered respondent to reinstate them with back pay. *Held:* The Board correctly interpreted and applied the Act to the circumstances of this case, and the Court of Appeals should have enforced its order. Pp. 10–18.

(a) These employees did not lose their right under § 7 to engage in concerted activities merely because they did not present a specific demand upon their employer to remedy a condition they found objectionable. Pp. 14–15.

(b) The walkout involved here grew out of a "labor dispute" within the meaning of § 2 (a) of the Act. Pp. 15–16.

(c) The fact that respondent had an established rule forbidding employees to leave their work without permission of the foreman was not justifiable "cause" for their discharge within the meaning of § 10 (c). Pp. 16–17.

291 F. 2d 869, reversed.

Dominick L. Manoli argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Stuart Rothman, Norton J. Come* and *Samuel M. Singer.*

Robert R. Bair argued the cause and filed briefs for respondent.

663026 O-62-5

MR. JUSTICE BLACK delivered the opinion of the Court.

The Court of Appeals for the Fourth Circuit, with Chief Judge Sobeloff dissenting, refused to enforce an order of the National Labor Relations Board directing the respondent Washington Aluminum Company to reinstate and make whole seven employees whom the company had discharged for leaving their work in the machine shop without permission on claims that the shop was too cold to work in.[1] Because that decision raises important questions affecting the proper administration of the National Labor Relations Act,[2] we granted certiorari.[3]

The Board's order, as shown by the record and its findings, rested upon these facts and circumstances. The respondent company is engaged in the fabrication of aluminum products in Baltimore, Maryland, a business having interstate aspects that subject it to regulation under the National Labor Relations Act. The machine shop in which the seven discharged employees worked was not insulated and had a number of doors to the outside that had to be opened frequently. An oil furnace located in an adjoining building was the chief source of heat for the shop, although there were two gas-fired space heaters that contributed heat to a lesser extent. The heat pro-

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[1] 291 F. 2d 869. The Court of Appeals also refused to enforce another Board order requiring the respondent company to bargain collectively with the Industrial Union of Marine & Shipbuilding Workers of America, AFL–CIO, as the certified bargaining representative of its employees. Since the Union's status as majority bargaining representative turns on the ballots cast in the Board election by four of the seven discharged employees, the enforceability of that order depends upon the validity of the discharges being challenged in the principal part of the case. Our decision on the discharge question will therefore also govern the refusal-to-bargain issue.

[2] 49 Stat. 449, as amended, 61 Stat. 136, 29 U. S. C. § 151 *et seq.*

[3] 368 U. S. 924.

duced by these units was not always satisfactory and, even prior to the day of the walkout involved here, several of the eight machinists who made up the day shift at the shop had complained from time to time to the company's foreman "over the cold working conditions." [4]

January 5, 1959, was an extraordinarily cold day for Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22. When the employees on the day shift came to work that morning, they found the shop bitterly cold, due not only to the unusually harsh weather, but also to the fact that the large oil furnace had broken down the night before and had not as yet been put back into operation. As the workers gathered in the shop just before the starting hour of 7:30, one of them, a Mr. Caron, went into the office of Mr. Jarvis, the foreman, hoping to warm himself but, instead, found the foreman's quarters as uncomfortable as the rest of the shop. As Caron and Jarvis sat in Jarvis' office discussing how bitingly cold the building was, some of the other machinists walked by the office window "huddled" together in a fashion that caused Jarvis to exclaim that "[i]f those fellows had any guts at all, they would go home." When the starting buzzer sounded a few moments later, Caron walked back to his working place in the shop and found all the other machinists "huddled there, shaking a little, cold." Caron then said to these workers, ". . . Dave [Jarvis] told me if we had any guts, we would go home. . . . I am going home, it is too damned cold to work." Caron asked the other

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[4] The Board made a specific finding on this issue: "We rely, *inter alia*, upon . . . the credited testimony of employees Heinlein, Caron, and George as to previous complaints made to the Respondent's foremen over the cold working conditions, and to the effect that the men left on the morning of January 5 in protest of the coldness at the plant . . . ." 126 N. L. R. B. 1410, 1411.

workers what they were going to do and, after some discussion among themselves, they decided to leave with him. One of these workers, testifying before the Board, summarized their entire discussion this way: "And we had all got together and thought it would be a good idea to go home; maybe we could get some heat brought into the plant that way." [5] As they started to leave, Jarvis approached and persuaded one of the workers to remain at the job. But Caron and the other six workers on the day shift left practically in a body in a matter of minutes after the 7:30 buzzer.

When the company's general foreman arrived between 7:45 and 8 that morning, Jarvis promptly informed him that all but one of the employees had left because the shop was too cold. The company's president came in at approximately 8:20 a. m. and, upon learning of the walkout, immediately said to the foreman, ". . . if they have all gone, we are going to terminate them." After discussion "at great length" between the general foreman and the company president as to what might be the effect of the walkout on employee discipline and plant production, the president formalized his discharge of the workers who had walked out by giving orders at 9 a. m. that the affected workers should be notified about their discharge immediately, either by telephone, telegram or personally. This was done.

On these facts the Board found that the conduct of the workers was a concerted activity to protest the company's failure to supply adequate heat in its machine shop, that such conduct is protected under the provision of § 7 of the National Labor Relations Act which guarantees that "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective

[5] The Trial Examiner expressly credited this testimony and the Board expressly relied upon it. 126 N. L. R. B., at 1411.

bargaining or other mutual aid or protection," [6] and that the discharge of these workers by the company amounted to an unfair labor practice under § 8 (a)(1) of the Act, which forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." [7] Acting under the authority of § 10 (c) of the Act, which provides that when an employer has been guilty of an unfair labor practice the Board can "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act," [8] the Board then ordered the company to reinstate the discharged workers to their previous positions and to make them whole for losses resulting from what the Board found to have been the unlawful termination of their employment.

In denying enforcement of this order, the majority of the Court of Appeals took the position that because the workers simply "summarily left their place of employment" without affording the company an "opportunity to avoid the work stoppage by granting a concession to a demand," their walkout did not amount to a concerted activity protected by § 7 of the Act.[9] On this basis, they

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[6] 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 157. Section 7 in full is as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

[7] 49 Stat. 452, as amended, 61 Stat. 140, 29 U. S. C. § 158 (a)(1).

[8] 49 Stat. 453–454, as amended, 61 Stat. 146–147, 29 U. S. C. § 160 (c).

[9] 291 F. 2d, at 877.

held that there was no justification for the conduct of the workers in violating the established rules of the plant by leaving their jobs without permission and that the Board had therefore exceeded its power in issuing the order involved here because § 10 (c) declares that the Board shall not require reinstatement or back pay for an employee whom an employer has suspended or discharged "for cause." [10]

We cannot agree that employees necessarily lose their right to engage in concerted activities under § 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. To compel the Board to interpret and apply that language in the restricted fashion suggested by the respondent here would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions. Indeed, as indicated by this very case, such an interpretation of § 7 might place burdens upon employees so great that it would effectively nullify the right to engage in concerted activities which that section protects. The seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could. As pointed out above, prior to the day they left the shop, several of them had repeatedly complained to company officials about the cold working

[10] "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 49 Stat. 453–454, as amended, 61 Stat. 146–147, 29 U. S. C. § 160 (c).

conditions in the shop. These had been more or less spontaneous individual pleas, unsupported by any threat of concerted protest, to which the company apparently gave little consideration and which it now says the Board should have treated as nothing more than "the same sort of gripes as the gripes made about the heat in the summertime." The bitter cold of January 5, however, finally brought these workers' individual complaints into concert so that some more effective action could be considered. Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. This we think was enough to justify the Board's holding that they were not required to make any more specific demand than they did to be entitled to the protection of § 7.

Although the company contends to the contrary, we think that the walkout involved here did grow out of a "labor dispute" within the plain meaning of the definition of that term in § 2 (9) of the Act, which declares that it includes "any controversy concerning terms, tenure or *conditions of employment* . . . ." [11] The findings of the Board, which are supported by substantial evidence and which were not disturbed below, show a running dispute between the machine shop employees and the company over the heating of the shop on cold days—a dispute which culminated in the decision of the

[11] 49 Stat. 450, as amended, 61 Stat. 137–138, 29 U. S. C. § 152 (9). (Emphasis supplied.)

employees to act concertedly in an effort to force the company to improve that condition of their employment. The fact that the company was already making every effort to repair the furnace and bring heat into the shop that morning does not change the nature of the controversy that caused the walkout. At the very most, that fact might tend to indicate that the conduct of the men in leaving was unnecessary and unwise, and it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.[12] Moreover, the evidence here shows that the conduct of these workers was far from unjustified under the circumstances. The company's own foreman expressed the opinion that the shop was so cold that the men should go home. This statement by the foreman but emphasizes the obvious—that is, that the conditions of coldness about which complaint had been made before had been so aggravated on the day of the walkout that the concerted action of the men in leaving their jobs seemed like a perfectly natural and reasonable thing to do.

Nor can we accept the company's contention that because it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant. Section 10 (c) of the Act does authorize an employer to discharge employees for "cause" and our cases have long recognized this right

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[12] "The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute." *Labor Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344.

on the part of an employer.[13] But this, of course, cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which § 7 of the Act protects. And the plant rule in question here purports to permit the company to do just that for it would prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the company's foreman was obtained.

It is of course true that § 7 does not protect all concerted activities, but that aspect of the section is not involved in this case. The activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful,[14] violent[15] or in breach of contract.[16] Nor can they be brought under this Court's more recent pronouncement which denied the protection of § 7 to activities characterized as "indefensible" because they were there found to show a disloyalty to the workers' employer which this Court deemed unnecessary to carry on the workers' legitimate concerted activities.[17] The activities of these seven employees cannot be classified as "indefensible" by any recognized standard of conduct. Indeed, concerted activities by employees for the purpose of trying to protect themselves from working conditions as uncomfortable as the testimony and Board findings showed them to be in this case are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours.

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[13] See, *e. g.*, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45.

[14] *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31.

[15] *Labor Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

[16] *Labor Board* v. *Sands Manufacturing Co.*, 306 U. S. 332.

[17] *Labor Board* v. *Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U. S. 464, 477.

We hold therefore that the Board correctly interpreted and applied the Act to the circumstances of this case and it was error for the Court of Appeals to refuse to enforce its order. The judgment of the Court of Appeals is reversed and the cause is remanded to that court with directions to enforce the order in its entirety.

Reversed and remanded.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

SUNKIST GROWERS, INC., ET AL. *v.* WINCKLER & SMITH CITRUS PRODUCTS CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 241. Argued March 21–22, 1962.—Decided May 28, 1962.

A group of citrus fruit growers in California and Arizona organized local cooperative associations which joined together for the purpose of collectively marketing their fruit through the agency of an areawide marketing cooperative and two processing cooperatives. Respondents sued petitioners, the areawide cooperative and one of the processing cooperatives, for treble damages under § 4 of the Clayton Act, claiming that they had conspired with the other processing cooperative and two privately owned processing corporations to restrain and monopolize interstate trade in citrus fruit and by-products and had actually monopolized the same, in violation of §§ 1 and 2 of the Sherman Act. *Held:* In view of the exemption from the antitrust laws accorded to agricultural cooperatives by § 6 of the Clayton Act and § 1 of the Capper-Volstead Act, 7 U. S. C. § 291, a judgment based on a general verdict against petitioners, which may have rested on a finding of an unlawful conspiracy among the three cooperatives, must be reversed. Pp. 20–30.

(a) The instructions in this case left it open for the jury to base its verdict on a finding of a conspiracy among the marketing cooperative and the two processing cooperatives. Pp. 25–26.

(b) On the record in this case it cannot be said that petitioners waived their objection to these instructions. Pp. 26–27.

(c) In view of the provisions of § 6 of the Clayton Act and § 1 of the Capper-Volstead Act, the three legal entities formed by these growers for the purpose of processing and marketing their agricultural products cooperatively cannot be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. Pp. 27–29.

(d) Where one of several theories submitted to a jury is held erroneous, a general verdict must be reversed, as it may have rested on the erroneous theory. Pp. 29–30.

284 F. 2d 1, reversed and cause remanded.

Herman F. Selvin argued the cause for petitioners. With him on the briefs was *Ross C. Fisher.*

William C. Dixon argued the cause for respondents. With him on the briefs was *Holmes Baldridge.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a treble damage suit brought under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, charging petitioners, Sunkist Growers, Incorporated, and The Exchange Orange Products Company, with conspiracy to restrain and monopolize interstate trade and commerce in citrus fruits and by-products and with actual monopolization thereof in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 2, as amended. The petitioners are each agricultural cooperative organizations, Exchange Orange being a wholly owned subsidiary of Sunkist. Petitioners contend the case was submitted under instructions permitting the jury to find an illegal conspiracy among them and Exchange Lemon Products Company, a cooperative processing association owned and operated exclusively by a number of lemon-grower associations all of which are members of Sunkist Growers, Inc. They say that under the exemptions from the antitrust laws granted agricultural associations by § 6 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 17, and § 1 of the Capper-Volstead Act, 42 Stat. 388, 7 U. S. C. § 291, Sunkist, Exchange Orange, and Exchange Lemon, being made up of the same growers and associations, cannot be charged with conspiracy among themselves. The trial court overruled this contention, among others, and the jury returned a verdict of $500,000. Judgment for treble this amount and attorney fees, less some minor offsets, was entered. The Court of Appeals, accepting petitioners' view of the instructions, held that the exemption claimed did not apply here and affirmed the judgment as to liability but

reversed as to the amount of damages. 284 F. 2d 1. We granted certiorari limited to the issue of the immunity of interorganizational dealings among the three cooperatives from the conspiracy provisions of the antitrust laws. 368 U. S. 813. We have concluded that the case was submitted to the jury on the theory claimed by petitioners and that this was erroneous. Thus we reverse the judgment.

Sunkist Growers, Inc., has at its base 12,000 growers of citrus fruits in California and Arizona. These growers are organized into local associations which operate packing houses. The associations in turn are grouped into district exchanges, and representatives from these exchanges make up the governing board of Sunkist, a nonstock membership corporation. Sunkist serves the members as an organization for marketing their fresh fruit and fruit products [1] through its field, advertising, sales, and traffic departments. All of its net revenues are distributed to the members.

In 1915 several member associations of Sunkist undertook to develop by-products for lemons in order to create a market for produce not salable as fresh fruit. Because this was a new, untried field the entire cooperative did not participate. Rather a separate cooperative—Exchange Lemon, a nonprofit stock corporation—was formed for this venture by the interested associations. Since that time Exchange Lemon has retained its separate identity although it is made up exclusively of lemon-grower associations which are also members of Sunkist. Its function now is primarily one of processing, and the resultant products are marketed for the owners by Sunkist through its products department, which is jointly managed by directors of Exchange Lemon and Exchange Orange.

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[1] These include juices, concentrates, oil, pectin, pharmaceuticals, and cattle feed.

One year after the organization of Exchange Lemon a similar association was formed to develop by-products for oranges. This organization, Exchange Orange, was comprised of a number of Sunkist member associations until 1931. At that time the Sunkist directors decided to make the processing facilities of Exchange Orange available to all of its member associations by purchasing it and operating it as a wholly owned subsidiary.

In sum, the individual growers involved each belong to a local grower association. Fruit which is to be sold fresh is packed by the associations and marketed by Sunkist, a nonstock membership corporation comprised of district exchanges to which the associations belong. Most fruit which is to be processed into by-products is handled by Exchange Orange, a subsidiary of Sunkist, or by Exchange Lemon, a separate organization comprised of a number of Sunkist member associations.[2] It is then marketed by the products department of Sunkist which is managed by directors of Exchange Orange and Exchange Lemon.

Competing with the three cooperatives in the California-Arizona area in the business of processing and selling canned orange juice were four independent processors, which were primarily dependent upon Sunkist for their supply of by-product oranges.[3] In 1951 two of these concerns, TreeSweet Products Company and E. A. Silzle Corporation, had process-and-purchase contracts with Exchange Orange. Under its contract TreeSweet agreed to process at cost an undetermined amount of oranges provided by Exchange Orange and to purchase the resultant orange juice at the then current price of Sunkist. The average net price for the oranges under this contract was

[2] Some by-product fruit is sold to or processed by independent processors.

[3] Sunkist also sold by-product oranges to additional companies for processing into by-products other than canned orange juice.

alleged to have been $25.10 per ton.[4] The contract with Silzle provided that it would process a stated amount of oranges for Exchange Orange and purchase the juice at a stated price less its processing cost alleged to have netted $17.66 per ton.[5] The third producer, Case-Swayne Company, allegedly declined Sunkist's offer of a similar contract. Respondent Winckler & Smith Citrus Products Company, the final processor, was offered oranges only at the list price of $40 to $44 per ton, depending upon content of soluble solids, and was refused the process-and-purchase arrangements described above.

Respondents brought this suit on the theory that Sunkist and Exchange Orange controlled the supply of by-product oranges available in the California-Arizona area to independent processors; that they combined and conspired with Exchange Lemon, TreeSweet, and Silzle to restrain and to monopolize interstate trade and commerce in 1951 in the processing and sale of citrus fruit juices, particularly canned orange juice; that they in fact monopolized such trade and commerce; and that the purpose or effect thereof was the elimination of Winckler as a competitor in the sale of such juices. Respondents relied on six specific acts and contracts which allegedly furthered the conspiracy, namely: (1) the processing of oranges at cost by Exchange Lemon for Exchange Orange during 1951; (2) the processing of lemons at cost by Exchange Orange for Exchange Lemon during 1951; (3) the establishment by Sunkist and Exchange Orange of a price to independent processors alleged to be too high to enable purchasers to compete, *i. e.*, the $40–$44 per ton list price; (4) the contract between Exchange Orange and TreeSweet in 1951; (5) the contract between Ex-

[4] The soluble solids content of the oranges processed by TreeSweet under this contract averaged 131.6 pounds per ton.

[5] The soluble solids content of these oranges averaged 120 pounds per ton.

change Orange and Silzle in 1951; (6) the refusal to sign a comparable contract with respondent Winckler.

After a lengthy trial producing a 4,000-page transcript, the case went to the jury under a necessarily complicated charge. As to the parties the jury might find to have participated in an illegal conspiracy, the court gave several instructions. One, given early in the charge, was that:

> "a parent corporation and its wholly-owned subsidiary can be guilty of combining or conspiring together to violate the antitrust laws. The defendants Sunkist Growers, Inc., and its wholly-owned subsidiary Exchange Orange Products Company, can accordingly combine or conspire together or with others to violate Sections 1 and 2 of the Sherman Act as charged in the first and second causes of action, subject to other instructions concerning the Capper-Volstead Act, and Section 6 of the Clayton Act, and the exemptions contained therein."

The instructions on the Clayton and Capper-Volstead Acts merely stated that the cooperatives could lawfully have a monopoly of the fruit and products in which they dealt. Later references to the alleged conspiracy often mentioned only petitioners and the two independent processors, *e. g.*, "If you find that either or both of the defendants [Sunkist and Exchange Orange, petitioners here] combined with TreeSweet or Silzle to eliminate the competition of the plaintiff . . . ." However, the court's concluding instructions on the subject could well have been taken by the jury as permitting them to find an illegal conspiracy solely among the three cooperatives:

> "Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP [Exchange Lemon Prod-

ucts], and in 1951 did one or more of the specific acts charged . . . .

". . . Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators [one of which was Exchange Lemon], combined and conspired, and pursuant to such combination or conspiracy . . . .

"Those are summary instructions which sort of sum up what is charged and what the plaintiff must prove."

And in a final addendum after consultation with counsel the court instructed that:

"I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.

"However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired."

On the question now before us, the Court of Appeals held that any objection to at least one of the conspiracy instructions was waived; that in any event different agricultural cooperatives combining together are not entitled to claim a total immunity for acts which they might do unilaterally and individually; and that the common ownership of Sunkist, Exchange Orange, and Exchange Lemon did not prevent the finding of an illegal conspiracy among them.

We believe the instructions quite plainly left it open for the jury to base their verdict upon a finding of a conspiracy among petitioners and Exchange Lemon.[6] At the outset

[6] It could be argued that the instructions also permitted the jury to find an illegal conspiracy solely between petitioners. Our holding renders unnecessary an evaluation of this interpretation of the charge.

the court instructed that a conspiracy could be found between Sunkist and its wholly owned subsidiary Exchange Orange. Thereafter the charge advised the jury that a finding of conspiracy between "Sunkist or Exchange Orange or either of them . . . [and] either TreeSweet, or Silzle, or ELP" was sufficient basis for a judgment against petitioners. From this it is entirely probable that the jury's verdict against both petitioners was based on their finding of a conspiracy among Sunkist, Exchange Orange, and Exchange Lemon. There is no question that Exchange Lemon was identified in the complaint and throughout the trial as an alleged co-conspirator. In no fewer than five instances did the trial court refer to the alleged conspiracy as being among petitioners and the "co-conspirators" or petitioners and Exchange Lemon, TreeSweet, or Silzle. The final summarization on conspiracy was in terms of finding that petitioners combined or conspired with either TreeSweet or Silzle or Exchange Lemon, and the addendum instructions emphasized that the jury could find either or both petitioners had illegally conspired with any one of the alleged co-conspirators. It is true that in some instances the court's conspiracy instructions mentioned only TreeSweet and Silzle as co-conspirators. Conjecture as to the reasons for this would not be fruitful. For it is clear that the court never limited the jury to a consideration of those parties as the sole co-conspirators. And other instructions, including the summarization, allowed the jury to base their verdict upon a finding of an illegal conspiracy solely among Sunkist, Exchange Orange, and Exchange Lemon.

It is suggested by respondents and the court below that petitioners waived their objection to these instructions. This is based on petitioners' acquiescence in the additional instructions, including references to the conspiracy, given the jury after the general charge. But petitioners' actions

here must be viewed in context. Prior to the general charge, conferences of counsel and the trial court were held to discuss the instructions. At each point counsel for petitioners objected to instructions which suggested that the three cooperatives might be found to have illegally conspired among themselves and requested instructions that would have limited a finding of an unlawful conspiracy in this case to one among petitioners and TreeSweet or Silzle. The trial court consistently ruled adversely to petitioners on this point. After the charge was delivered, counsel were told that all prior objections would be preserved and asked if they had any additional objections. In light of this assurance and petitioners' prior objections and requests, we believe the acquiescence in the added instructions could not be considered a waiver.

We are squarely presented, then, with the question of whether Sunkist, Exchange Orange, and Exchange Lemon—the three legal entities formed by these 12,000 growers—can be considered independent parties for the purposes of the conspiracy provisions of §§ 1 and 2 of the Sherman Act. We conclude not. Section 6 of the Clayton Act provides, *inter alia,* that agricultural organizations instituted for the purposes of mutual help shall not be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.[7]

[7] "Sec. 6. That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

The Capper-Volstead Act sets out this immunity in greater specificity:

> "That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ." [8]

There can be no doubt that under these statutes the 12,000 California-Arizona citrus growers ultimately involved could join together into *one* organization for the collective processing and marketing of their fruit and fruit products without the business decisions of their officers being held combinations or conspiracies. The language of the Capper-Volstead Act is specific in permitting concerted efforts by farmers in the processing, preparing for market, and marketing of their products. And the legislative history of the Act reveals several references to the Sunkist organization—then called the California Fruit Growers Exchange and numbering 11,000 members—including a suggestion by Senator Capper that this was the type of cooperative that would find "definite legalization" under the legislation.[9] Although we cannot draw from these references a knowing approval of the

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[8] The Act has certain organizational requisites which are not in issue here.

[9] 61 Cong. Rec. 1036 (1921) (remarks of Representative Black); 62 Cong. Rec. 2052 (1922) (Senator Kellogg); 62 Cong. Rec. 2061 (1922) (Senator Capper); 62 Cong. Rec. 2277 (1922) (Senator Walsh).

tripartite legal organization of the 11,000 growers, they do indicate that a cooperative of such size and general activities was contemplated by the Act.

Instead of a single cooperative, these growers through local associations first formed one area-wide organization (Sunkist) for marketing purposes. When it was decided to perform research and processing on a joint basis, separate organizations were formed by the interested associations for reasons outlined above. At a later date one of these (Exchange Orange) was acquired by the Sunkist organization and is presently held as a subsidiary. The other (Exchange Lemon) is still owned by the lemon-grower associations, all of whom are also member associations of Sunkist. With due respect to the contrary opinions of the Court of Appeals and District Court, we feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one "organization" or "association" even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts. There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations. That the packing is done by local associations, the advertising, sales, and traffic by divisions of the area association, and the processing by separate organizations does not in our opinion preclude these growers from being considered one organization or association for purposes of the Clayton and Capper-Volstead Acts.

Since we hold erroneous one theory of liability upon which the general verdict may have rested—a conspiracy

among petitioners and Exchange Lemon—it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland* v. *Baldwin*, 112 U. S. 490, 493 (1884), "[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . . ." Suffice it to say that our decision in no way detracts from earlier cases holding agricultural cooperatives liable for conspiracies with outside groups, *United States* v. *Borden Co.*, 308 U. S. 188 (1939), and for monopolization, *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960).

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

SALEM *v.* UNITED STATES LINES CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 283. Argued March 19, 1962.—Decided May 28, 1962.

1. In this suit under the Jones Act based on unseaworthiness and negligence, seeking damages for personal injuries sustained by a seaman who fell as he went to his post in the crow's nest, *held:* It was error for the Court of Appeals to order a new trial on the ground that a jury could not determine, in the absence of supporting testimony by an expert in naval architecture, a claim that the shipowner had failed to equip the ship with necessary and feasible safety devices to prevent such a mishap. Pp. 31–37.
2. The evidence in this record provides no support for the trial court's award to the seaman of future maintenance for three years. Pp. 37–38.

293 F. 2d 121, affirmed in part and reversed in part.

Robert Klonsky argued the cause for petitioner. With him on the briefs was *Philip F. Di Costanzo.*

Walter X. Connor argued the cause and filed briefs for respondent.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The first question to be decided in this seaman's personal injury suit for damages on the grounds of unseaworthiness and negligence under the Jones Act [1] is whether the jury should have been allowed to determine, in the absence of supporting testimony by an expert in naval architecture, a claim that the shipowner failed to equip his ship with necessary and feasible safety devices to prevent the mishap which befell the seaman.

The trial judge submitted for the jury's determination various bases of respondent's alleged liability, including

[1] 41 Stat. 1007, 46 U. S. C. § 688.

the claim resting on the failure to provide certain safety devices. Because the jury returned a general verdict for the seaman, it cannot be said what basis of liability the jury found to exist. The Court of Appeals for the Second Circuit, Judge Smith dissenting, reversed and remanded for a new trial, holding that in the absence of expert evidence, it was error to have allowed the jury to consider the failure to provide safety devices. 293 F. 2d 121, 123–124. Since the question whether supporting expert testimony is needed is important in litigation of this type, we granted certiorari. 368 U. S. 811. We hold that the Court of Appeals erred.

Petitioner was a lookout on the S. S. *United States*. He was injured as he moved from a ladder to a platform leading to his post in the crow's-nest. The crow's-nest was housed in a "bubble" half way up a hollow aluminum radar tower which rose 65 feet from the bridge deck. The ladder extended the full height of the tower along the inside of its after side. At various levels inside the tower were horizontal platforms, at the after ends of which were access openings slightly larger than manholes, through which the ladder passed straight up. The tower was more than six feet from fore to aft at the crow's-nest level, and tapered from four to three feet in width. There was only a narrow ledge around three-quarters of the opening in the platform at that level; the platform proper was toward the bow, and led to the door in the crow's-nest. As a seaman climbed the ladder to the crow's-nest, he faced astern until his feet were approximately level with the platform. To get from the ladder to the platform proper, he had to pivot, putting one foot on the starboard or port ledge, follow it with the other foot, complete his pivot and step forward along the ledge to the platform proper. Although the respondent describes the crow's-nest and its approach as "purposely constructed

so as to provide maximum protection and safety for members of the crew having to use it," there were no devices intended to facilitate safe maneuvering from ladder to platform; for support during this maneuver, the seaman could grasp one of the thin vertical beams located at intervals along the port and starboard sides, or a vertical, bulky rectangular pipe enclosing a radar cable and near the starboard side, or a horizontal stiffener or ledging that ran at shoulder-height around the tower. Respondent argues that the seaman also could simply spread his arms to brace himself against the sides of the tower.

On the night of February 15–16, 1958, as the *United States* went at high speed and rolled in rough seas, the tower was plunged into darkness, just as the petitioner was executing the movement to the crow's-nest platform from the ladder. Illumination within the tower was provided by five electric lights at various levels, but these burned out frequently. Two had been out for a long period and two others had gone out a few hours before the accident, leaving as the only light that which was at the crow's-nest platform. At some point after petitioner had begun the maneuver from ladder to platform, but before he reached a place on the platform proper and away from the access opening, that last light went out. An instant later petitioner fell backwards across the opening and struck his head against the ladder and his lower back against the fore edge of the opening, leaving his body suspended in the opening. He grasped the ladder rungs and called for help from the lookout on duty in the crow's-nest. With the lookout's aid he was able to seat himself on the starboard ledge with his legs hanging down through the opening and his right arm around the cable pipe. The lookout returned to the crow's-nest to phone the bridge for help. In his absence the petitioner became dizzy and fell through the opening to a place eight feet below the platform.

The only issue before us on this phase of the case is whether the trial judge erred in instructing the jury that they might find the respondent liable for unseaworthiness or negligence for having failed to provide "railings or other safety devices" at the crow's-nest platform. The Court of Appeals held that it was error to submit that question to the jury because "There was no expert testimony that proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed within a tower leading to a crow's nest. Should the jury, under these conditions, have been permitted to decide whether proper marine architecture required railings or other safety devices? In two recent cases, this court has held that a jury should not be permitted to speculate on such matters in the absence of expert evidence." [2] 293 F. 2d, at 123. There was evidence, in the form of testimony and photographs, from which the jury might clearly see the construction at the

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[2] The majority quoted from *Martin* v. *United Fruit Co.*, 272 F. 2d 347, as follows: " 'Finally, we reject the plaintiff's contention that the trial court committed error in not permitting the jury to determine whether the placement of the hinge at the bottom of the deadlight was an improper method of ship construction so as to make the vessel unseaworthy. Surely this is a technical matter in which an expert knowledge of nautical architecture is required in order to form an intelligent judgment. Since no expert testimony was introduced, it was correct to exclude this matter from the jury's consideration.' " 293 F. 2d, at 123. The majority also quoted from *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart, Maatschappij*, 275 F. 2d 188, in which the question was whether a stopping arrangement could feasibly be made part of a ten-and-a-half boom to keep it from swinging freely: " 'In any event, the question was one of nautical architecture about which jurors lack the knowledge to form an intelligent judgment in the absence of expert testimony. Martin . . . . Since there was no expert testimony on the matter, it should not have been submitted to the jury.' " 293 F. 2d, at 123–124. Whatever may have required that the jury have the aid of expert testimony in those cases, no showing is made of the necessity here.

crow's-nest level which we have described. If the holding of the Court of Appeals is only that in this case there are peculiar fact circumstances which made it impossible for a jury to decide intelligently, we are not told what those circumstances are, and our examination of the record discloses none.[3] If the holding is that claims which might be said to touch upon naval architecture can never succeed without expert evidence, neither the Court of Appeals nor the respondent refers us to authority or reason for any such broad proposition.

This is not one of the rare causes of action in which the law predicates recovery upon expert testimony. See Wigmore, Evidence (3d ed. 1940), §§ 2090, 2090a. Rather, the general rule is as stated by Mr. Justice Van Devanter, when circuit judge, that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation . . . ." *United States Smelting Co.* v. *Parry,* 166 F. 407, 411, 415. Furthermore, the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous. *Spring Co.* v. *Edgar,* 99 U. S. 645, 658.

This Court has held, in a factual context similar to this, that there was no error, let alone manifest error, in having a jury decide without the aid of experts. *Spokane & Inland Empire R. Co.* v. *United States,* 241 U. S. 344,

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[3] Compare *Texas & Pacific R. Co.* v. *Watson,* 190 U. S. 287, 290, in which there may have been peculiar difficulties impeding installation of any truly effective safety device.

was an action by the United States to recover penalties for violation of the Safety Appliance Act provision requiring handholds or grab-irons to be placed on the ends of railroad cars used in interstate commerce.[4] The defendant railroad offered expert testimony to establish that the substitutes provided on its cars would accomplish the statute's purposes. The jury had inspected the cars, and the expert evidence was excluded when the United States objected that this "was a matter of common knowledge." We held that "the court was clearly right in holding that the question was not one for experts and that the jury after hearing the testimony and inspecting the [cars] were competent to determine the issue . . . ." 241 U. S., at 351.[5]

In sum, we agree with Judge Smith in dissent below:

> "There was before the jury sufficient evidence, both from oral testimony and from photographs, for it to visualize the platform on and from which plaintiff fell and to determine whether some railing or hand hold in addition to the structures present was reasonably necessary for the protection of a seaman passing from the ladder to the platform in the swaying mast.
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> ". . . [There is no] blanket proposition that any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony. Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's

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[4] 27 Stat. 531, 45 U. S. C. § 4.

[5] Although it was later held that the Safety Appliance Act has no room for the doctrine of equivalent, substitute devices, *St. Joseph & Grand Island R. Co.* v. *Moore*, 243 U. S. 311, the authority of *Spokane* on jury competence is unimpaired.

> duty to provide his seamen with a safe place to work. Such a determination hardly requires expert knowledge of naval architecture . . . ." 293 F. 2d, at 126.

Indeed, "if there was a reason hidden from the ordinary mind why this condition of things must have existed, those facts called upon the defendant to make that reason known." *Missouri, K. & T. R. Co.* v. *Williams,* 103 Tex. 228, 231, 125 S. W. 881, 882; and see *Poignant* v. *United States,* 225 F. 2d 595, 602 (concurring opinion).[6]

There is another question to be decided. The petitioner also sought maintenance and cure. The trial judge awarded past maintenance, which the respondent has not disputed, and also future maintenance for three years. The Court of Appeals set aside the award of future maintenance, saying: "There does not appear to be any sufficient basis, by opinion evidence or otherwise, for the finding that three years is the period reasonably to be

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[6] The value of an expert's testimony to explain what the best safety device might be is clear, but the question here is simply whether some such device should have been provided. *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.,* 10 F. 2d 47, 48. Nor would expert testimony about customary equippage be essential, *Pure Oil Co.* v. *Snipes,* 293 F. 2d 60, 71; nor, even if offered, would it have concluded the questions of unseaworthiness or negligence. *Wabash R. Co.* v. *McDaniels,* 107 U. S. 454, 460–461; *Grand Trunk R. Co.* v. *Richardson,* 91 U. S. 454, 469–470; *The T. J. Hooper,* 60 F. 2d 737; *Kennair* v. *Mississippi Shipping Co.,* 197 F. 2d 605; *June T., Inc.,* v. *King,* 290 F. 2d 404.

Although the law favors the aid of experts if the problem is not one "upon which the lay or uneducated mind is capable of forming a judgment," *Milwaukee & St. P. R. Co.* v. *Kellogg,* 94 U. S. 469, 472, if the matter is only arguably beyond common experience, expert testimony will be admitted with care. The rule reflects the consideration of avoidance of unnecessarily prolonged trials and attendant expense and confusion. *Winans* v. *New York & Erie R. Co.,* 21 How. 88, 100–101; and see *Thorn* v. *Worthing Skating Rink Co.* (1876), reported in *Plimpton* v. *Spiller,* 6 Ch. D. 412, footnote at 415–418 (1877).

expected for Salem to reach maximum improvement." 293 F. 2d, at 125. The trial judge made no findings. We have therefore examined the evidence on the question in the light of what was said in *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525, 531–532: ". . . [A]mounts [for future maintenance should be such] as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained." We agree that the evidence provides no support under that test for the award of three years' future maintenance.

We affirm as respects maintenance but otherwise reverse the judgment of the Court of Appeals. Since other grounds of reversal urged by the respondent were not reached by that court, the case is remanded to it for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, dissenting in part and concurring in part.

I do not read the Court of Appeals' opinion either as holding that, because of "peculiar fact circumstances" petitioner's claims respecting the alleged faulty construction of the radar tower required "*supporting* expert testimony" (*ante,* pp. 35, 32) (emphasis added), or as establishing a general proposition that such testimony is needed in every instance where a seaman claims to have been injured because of his employer's failure to equip a ship with safety devices.

Taking its opinion in light of the record, I think it apparent that the Court of Appeals held no more than that reversal was required because "there was no evidence of *any kind* in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy." 293 F. 2d, at 123. (Emphasis added.) To me it seems clear that the court referred to expert testimony simply as an example of the kind of evidence that the petitioner might have offered on this score. Consequently, the District Court's charge that the jury could find the respondent negligent "in failing to provide railings or other safety devices" had injected into the case a theory of liability which had not been presented to the jury by the evidence introduced at the trial. This has uniformly been held to constitute reversible error. *E. g., Mandel* v. *Pennsylvania R. Co.*, 291 F. 2d 433; *Smith* v. *Ellerman Lines, Ltd.*, 247 F. 2d 761, 766; see *Wilmington Star Mining Co.* v. *Fulton*, 205 U. S. 60, 78–79.

The trial transcript, insofar as it has been reproduced in the record before this Court, bears out the conclusion of the Court of Appeals that evidence with respect to the alleged failure to maintain appropriate safety devices was entirely lacking. Petitioner's evidence, apart from medical testimony concerning the extent of his injuries, related almost entirely to the alleged slippery condition of the platform leading to the crow's-nest, the inadequate and defective lighting, and the negligence of the lookout. Petitioner himself did testify that there was no "grip" or "handrails" at the crow's-nest level, and photographs that were introduced into evidence confirmed this undisputed assertion.

With nothing more before the jury than this, the trial court's instruction certainly left the jury entirely at large

to reach an uninformed conclusion as to what would have constituted reasonable conduct on the part of the respondent with respect to the equipping of this part of the ship. No evidence of any kind was introduced to show whether radar towers on vessels of this sort ordinarily were equipped with safety devices or whether seamen assigned thereto had need of such equipment in the ordinary course of their activities. Expert testimony would have served this purpose, as would any other evidence bearing probatively on the reasonableness of respondent's conduct in failing to equip its vessel with these devices. In the absence of any such evidence the Court of Appeals was entirely justified in holding that the District Court's instruction amounted to reversible error.

I agree with this Court's holding as to future maintenance. I would affirm.

BEARD *v.* STAHR, SECRETARY OF THE ARMY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 648. Decided May 28, 1962.

After administrative proceedings by an Army Board of Inquiry and a Board of Review under 10 U. S. C. (Supp. II) §§ 3792 and 3793 had resulted in a recommendation that the Secretary of the Army remove appellant, a commissioned officer in the Regular Army, from the active list and award him a general discharge, but before the Secretary had taken any action under § 3794, appellant sued in a Federal District Court to enjoin the Secretary from determining whether he should be removed. He claimed that the administrative proceedings were unconstitutional because they deprived him of his office and retirement benefits without due process of law. The District Court sustained the constitutionality of the statute and the administrative proceedings and dismissed the complaint. *Held:* The judgment is vacated with directions to dismiss the complaint as premature. Application for a stay is denied. Pp. 41–42.

Reported below: 200 F. Supp. 766.

Frederick Bernays Wiener for appellant.

Solicitor General Cox, Assistant Attorney General Orrick and *John G. Laughlin, Jr.* for appellees.

PER CURIAM.

The judgment of the District Court is vacated and the cause is remanded with directions to dismiss the complaint. The action is premature. The appellant will not be removed from the active list of the Regular Army unless the Secretary of the Army exercises the discretionary authority to remove him conferred by 10 U. S. C. § 3794. The Secretary has not stated that he will so exercise his discretion as to remove appellant. If the Secretary does not remove the appellant it will be unnecessary

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to pass on the constitutional objections which have been urged. If appellant is removed, the Court is satisfied that adequate procedures for seeking redress will be open to him. Compare *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772–773. Accordingly, the application for a stay is denied.

THE CHIEF JUSTICE is of the opinion that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits and would grant the application for a stay.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Appellant is a Major in the Regular Army and has the temporary rank of Lieutenant Colonel. He served in World War II and received the Bronze Star Medal. He at present has had over 19 years of active federal service and will be eligible for retirement in November 1962. But for the present charge against him his military record reflects exemplary conduct and high efficiency ratings.

These years of faithful service have now gone largely for naught under a decision of an Army Board of Review recommending that he be given a general discharge. Whatever the merits may be, I believe that the procedure used at his hearing violated our standards of fairness.

Under the statute here in question, 10 U. S. C. § 3792 (c), an officer faced with a charge carries the burden of proof that "he should be retained on the active list."

The District Court held that there was no constitutional objection to placing this burden of proof on the officer. 200 F. Supp. 766, 775. It reasoned that since

the President could dismiss an officer summarily,* Congress could place on the one removed "the onus of convincing his superiors that he should not be eliminated." *Ibid.* Dismissal is one thing; dismissal with stigma, as here, is quite another. Dismissal with stigma is a severe penalty. In comparable situations, the Government has been required to carry the burden of proof. *Kwong Hai Chew* v. *Rogers,* 103 U. S. App. D. C. 228, 257 F. 2d 606; *Wood* v. *Hoy,* 266 F. 2d 825, 830. Unless this burden is meticulously maintained, discharge for race, for religion, for political opinion, or for beliefs may masquerade under unproved charges. This right, like the right to be heard, is basic to our society. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (concurring opinion); *Beilan* v. *Board of Education,* 357 U. S. 399, 421–423 (dissenting opinion); *Wieman* v. *Updegraff,* 344 U. S. 183, 191.

There is a second reason why we should remand this case for a new hearing. The one witness whose testimony was critical to the case was not called. Confrontation and cross-examination are, as I understand the law, vital when one's employment rights are involved (see *Greene* v. *McElroy,* 360 U. S. 474, 496)—the factor that distinguishes *Cafeteria Workers* v. *McElroy,* 367 U. S. 886, where the only question was access to a military base. Perhaps the missing accuser—whose activities were described in uncomplimentary terms in *Rittenour* v. *District of Columbia,* 163 A. 2d 558—would have made such an unbecoming witness that the Board would have dismissed the charges. Faceless informers are often effective if they need not take the stand. A fair hearing requires the production of the accuser so that cross-examination can test his character and reliability. That question is very close

*Which, of course, is a mistaken premise. See *Wiener* v. *United States,* 357 U. S. 349; *Blake* v. *United States,* 103 U. S. 227, 231.

to the one involved in No. 1123, Misc., *Williams* v. *Zuckert,* in which we granted certiorari only the other day. 369 U. S. 884. This case should be heard with that one.

I think the present case is ripe for review. Once the Secretary of the Army approves the decision now challenged, appellant will be severed from military service with less than an honorable discharge. If a wrong was committed, I assume that he could recover a judgment that restores any loss of salary or pension. More than dollars, however, are involved: at stake is a man's professional standing, his character, and his claim to an honorable discharge. Where the Army departs from the statutory standard which prescribes the basis on which discharges will be issued, the federal courts can intervene. See *Harmon* v. *Brucker,* 355 U. S. 579. Though the Court's opinion may be read as indicating that a collateral proceeding to set aside one discharge and to direct that an honorable one be granted may lie, we should nonetheless halt this irregular procedure *in limine.* For we are dealing here with the charge of "conduct unbecoming an officer," a charge that carries a heavy stigma. As Winthrop said: "Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." Military Law and Precedents (2d ed. 1896) 1104.

If declaratory relief will be accorded, as it certainly could be (*Bland* v. *Connally,* 110 U. S. App. D. C. 375, 293 F. 2d 852), this action for an injunction is timely to prevent an injustice. As recently stated: "We think it must be conceded that any discharge characterized as less than honorable will result in serious injury. It not only means

the loss of numerous benefits in both the federal and state systems, but it also results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment." 110 U. S. App. D. C. 375, 381, 293 F. 2d 852, 858.

I would reverse the judgment below and direct that appellant be accorded a hearing that comports with the requirements of due process.

WATKINS *v.* CITY OF WILSON ET AL.

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

No. 789. Decided May 28, 1962.

Appeal dismissed and certiorari denied.
Reported below: 255 N. C. 510, 121 S. E. 2d 861.

Romallus O. Murphy and *Samuel S. Mitchell* for appellant.

John F. Doyle for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

FASS *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 824. Decided May 28, 1962.

Appeal dismissed and certiorari denied.
Reported below: 36 N. J. 102, 175 A. 2d 193.

Joseph L. Freiman for appellant.

Arthur J. Sills, Attorney General of New Jersey, *Theodore I. Botter,* Assistant Attorney General, and *Herman D. Ringle* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

BUSBY ET AL. *v.* HARRIS, JUDGE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 728, Misc. Decided May 28, 1962.

Certiorari granted; judgment of Court of Appeals vacated and case remanded to that court with directions to dismiss the proceedings as moot.

Petitioners *pro se*.

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *Howard A. Glickstein* for respondents.

PER CURIAM.

Upon the Solicitor General's suggestion of mootness and upon an examination of the entire record, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Court of Appeals is vacated and the case is remanded to that court with directions to dismiss the proceedings upon the ground that the case is moot.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

GALLEGOS *v.* COLORADO.

CERTIORARI TO THE SUPREME COURT OF COLORADO.

No. 475. Argued April 9, 1962.—Decided June 4, 1962.

Petitioner, a 14-year-old boy, and another juvenile followed an elderly man to a hotel, got into his room on a ruse, assaulted and overpowered him, stole $13 from his pockets and fled. Picked up 12 days later by police, petitioner immediately admitted the assault and robbery. Over two weeks later, he was convicted in a juvenile court of "assault to injure" and was committed to the State Industrial School for an indeterminate period. Subsequently the victim died, and petitioner was charged with first degree murder. At his trial in a state court, a jury found him guilty. The crucial evidence introduced at the trial was a formal confession which petitioner had signed before his victim died, before petitioner had been brought before a judge, and after he had been held for five days without seeing a lawyer, parent, or other friendly adult, although his mother had attempted to see him. *Held:* On the totality of the circumstances in this case, the formal confession on which petitioner's conviction may have rested was obtained in violation of due process, and the judgment sustaining his conviction is reversed. Pp. 49–55.

145 Colo. 53, 358 P. 2d 1028, reversed.

Charles S. Vigil argued the cause and filed briefs for petitioner.

J. F. Brauer, Jr., Assistant Attorney General of Colorado, argued the cause for respondent. With him on the brief were *Duke W. Dunbar*, Attorney General, and *Frank E. Hickey*, Deputy Attorney General.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, a child of 14, and another juvenile followed an elderly man to a hotel, got into his room on a ruse, assaulted him, overpowered him, stole $13 from his pockets, and fled. All this happened on December 20,

1958. Petitioner was picked up by the police on January 1, 1959, and immediately admitted the assault and robbery. At that time, however, the victim of the robbery was still alive, though hospitalized. He died on January 26, 1959, and forthwith an information charging first degree murder was returned against petitioner. A jury found him guilty, the crucial evidence introduced at the trial being a formal confession which he signed on January 7, 1959, after he had been held for five days during which time he saw no lawyer, parent, or other friendly adult. The Supreme Court of Colorado affirmed the judgment of conviction. 145 Colo. 53, 358 P. 2d 1028. We granted the petition for certiorari, 368 U. S. 815.

After petitioner's arrest on January 1, the following events took place. His mother tried to see him on Friday, January 2, but permission was denied, the reason given being that visiting hours were from 7 p. m. to 8 p. m. on Monday and Thursday. From January 1 through January 7, petitioner was in Juvenile Hall, where he was kept in security, though he was allowed to eat with the other inmates. He was examined by the police in Juvenile Hall January 2, and made a confession which an officer recorded in longhand. On January 3, 1959, a complaint was filed against him in the Juvenile Court by the investigating detectives.

The State in its brief calls this preliminary procedure in Juvenile Hall being "booked in." As noted, petitioner signed a full and formal confession on January 7. The trial in the Juvenile Court took place January 16 on a petition dated January 13 containing a charge of "assault to injure." He was committed to the State Industrial School for an indeterminate period. Thereafter, as noted above, the victim of the robbery died and the murder trial was held.

Confessions obtained by "secret inquisitorial processes" (*Chambers* v. *Florida,* 309 U. S. 227, 237) are suspect,

since such procedures are conducive to the use of physical and psychological pressures. *Chambers* v. *Florida, supra; Leyra* v. *Denno,* 347 U. S. 556. The reason that due process, as used in the Fourteenth Amendment, condemns the obtaining of confessions in that manner is a compound of two influences. First is the procedural requirement stated in *Chambers* v. *Florida, supra,* 236–237:

> "From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty,' wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed."

We emphasized this point in *Ashcraft* v. *Tennessee,* 322 U. S. 143, 152, where we said that "always evidence concerning the inner details of secret inquisitions is weighted against an accused . . . ."

Second is the element of compulsion which is condemned by the Fifth Amendment. Chief Justice Hughes in *Brown* v. *Mississippi,* 297 U. S. 278, 285, emphasized that ingredient of due process. After noting that the Court had held that the exemption from compulsory self-incrimination in the courts of the States is not guaranteed by the Due Process Clause of the Fourteenth Amendment, he went on to say:

> "But the question of the right of the State to withdraw the privilege against self-incrimination is not

here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter." And see Brennan, The Bill of Rights and the States, 36 N. Y. U. L. Rev. 761.

We reiterated that view in *Ashcraft* v. *Tennessee, supra,* where we held that the principle of *Bram* v. *United States,* 168 U. S. 532, 562–563, was applicable to state proceedings. 322 U. S., at 154, n. 9. We said:

> "We think a situation such as that here shown by uncontradicted evidence is *so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect* against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room." 322 U. S., at 154. (Italics added.)

The application of these principles involves close scrutiny of the facts of individual cases. The length of the questioning (*Spano* v. *New York,* 360 U. S. 315), the use of fear to break a suspect (*Malinski* v. *New York,* 324 U. S. 401), the youth of the accused (*Haley* v. *Ohio,* 332 U. S. 596) are illustrative of the circumstances on which

cases of this kind turn. The youth of the suspect was the crucial factor in *Haley* v. *Ohio, supra,* at 599–600:

> "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made."

The fact that petitioner was only 14 years old puts this case on the same footing as *Haley* v. *Ohio, supra.* There

was here no evidence of prolonged questioning. But the five-day detention—during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact with any lawyer or adult advisor—gives the case an ominous cast. The prosecution says that the boy was advised of his right to counsel, but that he did not ask either for a lawyer or for his parents. But a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests or how to get the benefits of his constitutional rights.

The prosecution says that the youth and immaturity of the petitioner and the five-day detention are irrelevant, because the basic ingredients of the confession came tumbling out as soon as he was arrested. But if we took that position, it would, with all deference, be in callous disregard of this boy's constitutional rights. He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this inequality, a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had. To

allow this conviction to stand would, in effect, be to treat him as if he had no constitutional rights.

There is no guide to the decision of cases such as this, except the totality of circumstances that bear on the two factors we have mentioned. The youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of a lawyer or a friend—all these combine to make us conclude that the formal confession on which this conviction may have rested (see *Payne* v. *Arkansas,* 356 U. S. 560, 568) was obtained in violation of due process.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

As Chief Justice John Marshall said a century and a quarter ago, "[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined." *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 15 (1831). A 14-year-old boy stands convicted of murder and has been sentenced to imprisonment for life. But, as Mr. Justice Paterson said in *Penhallow* v. *Doane's Admr.,* 3 Dall. 54, 88–89 (1795), "motives of commiseration, from whatever source they flow, must not mingle in the administration of justice."

The Court sets aside the conviction here on due process grounds, finding that the formal confession made by petitioner on January 7 was obtained by "secret inquisitorial processes" and other forms of compulsion. In so doing it turns its back on the spontaneous oral admissions made

by petitioner at the time of arrest on January 1, as well as a detailed confession made the next day, all long before the formal confession was given five days later. Moreover, I find nothing in the record that suggests any "secret inquisitorial processes" were used or any compulsion was exerted upon petitioner even during that longer period. With due deference I cannot see how the Court concludes from the record that petitioner was "cut off from contact with any lawyer or adult advisor" and "made accessible only to the police," that there was a failure to bring him before the juvenile judge in the manner required in juvenile delinquency cases, or that Gallegos' case is in anywise on the same footing with *Haley* v. *Ohio*, 332 U. S. 596 (1948), or the other cases cited by the majority.

As the Court says, "the totality of circumstances" is the only guide we have in confession cases. However, in view of the hop, skip, and jump fashion in which the Court deals with them here, I believe it is first necessary to detail the facts.

The record through the testimony of Officer Chism, a special juvenile officer, shows that on Thursday evening, January 1, he was investigating the assault on Mr. Smith,[1] an 80-year-old man, when he noticed three boys who appeared to fit the description furnished him of the ones involved. The three, who were sitting on the curb outside of Dutchman's Inn, were the Gallegos brothers: petitioner Robert (14), Charles (12), and Richard (8). The officer, who was alone and in street clothes, stopped his car across the street from the inn. He approached the boys, told them he was a police officer, and asked them to come over and sit in his car. They did so and the officer asked them about the Smith assault. Richard orally confessed, and the petitioner "admitted he had a

[1] At this time Smith was still alive. He died on January 26, and the murder prosecution here at issue followed.

part in it." Officer Chism then took the boys to Juvenile Hall where the petitioner again admitted his participation, as did his youngest brother, Richard. Both stated that the third brother, Charles, had nothing to do with the matter, but that their cousin, Eddie Martinez, had accompanied them. Charles, having been cleared of any involvement in the assault, was taken home that very evening by Officer Chism, who told Mrs. Gallegos that the petitioner and Richard were being held at Juvenile Hall and that visiting hours were on Monday and Thursday evenings. He also informed her of her sons' right to counsel.

The next evening, January 2, Officer Chism talked to the petitioner, Richard, and Martinez, who by this time was also at Juvenile Hall. As the officer took notes,[2] petitioner again described his participation in the assault on Mr. Smith in the following manner as narrated by Officer Chism at the trial:

> "[After his participation in an assault on a Mr. Kruhd,] he proceeded down to 18th and Curtis Street where he was shining shoes . . . . [U]pon seeing an old man, who was later identified as Robert F. Smith, he followed him to a hotel on 18th street. . . . [H]e . . . was with his younger brother, Richard, and one Eddie Martinez. . . . They followed the old man to the hotel and Richard stayed downstairs and watched out for cops. He and Eddie went upstairs and they lost track of the old man; they asked several if they had seen his grandfather come in, that he had just come in and was drunk . . . [and] a man told . . . [them] he just went down the hallway, and upon knocking on the door a man opened the door and he told him he was looking for his grandfather, that he was drunk, and the man told

[2] These notes were signed by petitioner.

> him the old man next door had just come in. He said upon knocking on the other door someone told him to come in, that he opened the door and he seen it was the man he was looking for. . . . [A]t that time Eddie Martinez asked the old man for a drink of water and when the old man brought the water Eddie grabbed him and he, Robert, hit the old man about the head and face with a shoe brush; that when the old man fell to the floor he took a knife and held it to the old man's throat and took his billfold out [of] his back pocket. . . . [T]hey all left then and went to the Twenty-third Street Viaduct where he gave Eddie $3.00 and he kept $10.00 to split between him and Richard and they then went home . . . ."

That same evening, January 2, at 11:30 p. m., Mrs. Gallegos attempted to visit her two sons at Juvenile Hall but was again informed that visiting hours were 7 p. m. to 8 p. m. on Mondays and Thursdays. At the trial she testified that she made no effort to see her sons on the next visiting day, which was Monday, but waited until Thursday, January 8.

The record shows that on January 3 the officer filed in the juvenile court a detailed report of the arrest and petitioner's confessions together with a petition charging petitioner with juvenile delinquency. This was supplemented on the 5th by the report of the Kruhd assault and Kruhd's identification of petitioner and the other boys. The officer followed, as he was obliged to do, the juvenile court law of Colorado which provides for commitment in Juvenile Hall, report to the juvenile judge who supervises the Hall and its inmates, and the filing of a delinquency petition.

For the first few days at Juvenile Hall petitioner was placed in "security," which meant that he did not participate in the school program. The uncontradicted testi-

mony of the Hall Superintendent was that the decision to keep the petitioner out of the program was made by his unit supervisor in order to size up the boy, who had been charged with a serious crime, before placing him in the regular activities with the others. During this time he had all his meals with the other boys and conversed with his younger brother who was held in another ward. Although the petitioner did not testify at the trial in the presence of the jury, he admitted at a hearing held to determine the admissibility of the formal confession that he was only questioned three times between January 1 and January 7 and that no threats or physical coercion was used at any time.

On January 7 the police department sent a man over to formalize the earlier confessions. Officer Miller, who took the confession, testified that he told petitioner of the possibility of a murder charge, warned him that he did not have to make a statement, and told him that he could have his parents and an attorney present if he desired. Petitioner indicated that he did not so desire, and a formal confession was taken which was substantially identical to the statement given on January 2, as related by Officer Chism in his testimony. The confession was typed, and Officer Chism took it over to Juvenile Hall for petitioner to sign. He testified that petitioner read it aloud before signing it. Above his signature was the admission that the confession was made voluntarily and upon warning that it could be used against him.

On January 16 the three assailants were committed to the Industrial School by the juvenile court. Upon the death of Mr. Smith, petitioner on information was tried for murder. As noted above, the evidence included testimony of his admissions upon arrest and his confession on January 2, as well as the formal confession of January 7. These were admitted after independent findings of

voluntariness by the trial judge and jury. The latter was instructed that in determining whether petitioner freely and voluntarily made the confessions it was to take into account "the age, maturity, physical and mental condition of the defendant, the length of his confinement, his opportunity or lack of opportunity to seek friendly or professional aid, the advice or lack of advice given him as to his constitutional rights, and all other facts and circumstances surrounding such confession."

Before discussing the admissibility of the formal confession of January 7, I must first comment on the Court's treatment of the earlier confessions, *viz.*, those of January 1 and 2. Although the Court carefully refrains from holding these confessions inadmissible under due process standards, its innuendo that they were acquired "in callous disregard of this boy's constitutional rights" cannot pass unexposed. In regard to these confessions, the test of voluntariness as evidenced by the "totality of circumstances" leads the Court not to question them. Here there were no "secret inquisitorial processes" or compulsion of any kind as the Court envisions in relation to the confession of January 7. The Court's only criticism is that petitioner "would have no way of knowing what the consequences of his confession were without advice as to his rights . . . ." [3] The truth of the matter is that the singular circumstance pointed out by the Court has never been thought to render a confession inadmissible. See *Culombe* v. *Connecticut*, 367 U. S. 568, 577–602 (1961) (opinion of MR. JUSTICE FRANKFURTER).

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[3] There is no basis for the Court's suggestion that the officers improperly failed to bring petitioner before the juvenile judge when they first arrested him. The procedure used in Denver of filing a report with the juvenile judge and temporarily placing the offender in Juvenile Hall pending a hearing is in keeping with advanced procedures being followed with reference to juvenile offenders throughout the United States.

The Court is overturning petitioner's conviction because it flows in part from the formal confession of January 7. I cannot draw from this record a conclusion that this confession was involuntary. Petitioner freely admitted in testimony before the trial judge that he was not threatened or physically coerced in any way and that he was not intensively questioned. Moreover, prior to the formal confession he was told that he did not have to make a statement and warned of the possibility of a murder charge, as well as informed that he could have an attorney and his parents present. Officer Chism's testimony as to this matter was documented by the confession itself which recites that it was voluntary and given after notice that it could be used against him.

Petitioner was never placed in solitary confinement, as might be implied from the Court's opinion, but was merely kept out of the organized activities until the unit supervisor could determine whether his full-time participation would have an adverse effect on others. And even under this schedule he had all his meals with the other boys and conversed freely with them.

Nor was petitioner "cut off" from contact with lawyers or adults and "made accessible only to the police." His mother made no effort to obtain an attorney although informed of the right to do so.[4] And she was not prevented from seeing him but was merely asked to comply with reasonable visiting regulations. She was informed on two occasions that she could see him Monday, January 5, two days before the formal confession which the Court finds invalid, but she did not attempt to do so. And petitioner himself passed up the offer to confer with his parents and an attorney before making this confession.

In support of the above factors indicating that the confession of January 7 was voluntary is the undeniable fact

[4] Indeed, no attorney was obtained for petitioner's trial in the juvenile court.

that petitioner admitted on January 1 his participation in the assault and confessed in detail thereto on January 2. Both of these statements occurred prior to the events which the Court finds to have coerced the confession of January 7. I am hard pressed to understand how one could conclude that the police found it expedient to coerce the January 7 confession or that the events discussed by the Court rendered it involuntary when five days earlier a substantially identical confession was made in the absence of the "coercive" events.

As I have noted, in light of these facts I cannot conclude that this confession was involuntary. *A fortiori,* I could not determine, as the Court must, that so clear a case of coercion was made out that three prior findings that the confession was voluntary—including one by the jury which was specifically instructed to consider each of the factors relied on by the majority—can be reversed. I have carefully examined the cases upon which the Court relies and can find not one among them which in the least is apposite. There were no "secret inquisitorial processes" as in *Chambers* v. *Florida,* 309 U. S. 227 (1940). There Chambers, a Negro, for a week after arrest was kept *incommunicado,* moved from one jail to another, constantly questioned, and was finally subjected to around-the-clock interrogation by a relay of from 4 to 10 persons. Nor does *Leyra* v. *Denno,* 347 U. S. 556 (1954), in any way resemble this case. There the accused had requested a doctor in order to get relief from a painful sinus attack. The police brought in a psychiatrist who by subtle means induced him to confess after an hour or two of questioning. The state court found this confession invalid because of mental coercion. However, at the second trial subsequent confessions were admitted in evidence. This Court held that the psychiatric inducement used to extract the first confession poisoned and invalidated the subsequent ones. Likewise, the reference of the Court to Chief Jus-

tice Hughes' statement in *Brown* v. *Mississippi,* 297 U. S. 278, 285 (1936), concerning the "element of compulsion which is condemned by the Fifth Amendment," is misleading and inapposite. "The question in this case," he said in *Brown* with his usual conciseness, "is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States." *Id.,* at 279. Brown and the other suspects, the Chief Justice pointed out, had been stripped, laid over chairs and beaten with a leather strap with buckles until their backs were cut to pieces and they confessed. Nor does the holding in *Ashcraft* v. *Tennessee,* 322 U. S. 143 (1944), have any bearing on this case. It also involved "prosecutors serving in relays" keeping a person under continuous cross-examination for 36 hours without rest or sleep. Nor can it, in my view, be said that *Spano* v. *New York,* 360 U. S. 315 (1959), has any weight under the facts here. In that case continuous, all-night cross-examination by four officers, the refusal of repeated requests to consult his counsel, together with the use of an old friend who was a fledgling police officer as bait to break down the accused, led us to invalidate the confession. And in *Malinski* v. *New York,* 324 U. S. 401 (1945), the accused was stripped of his clothing and his request for counsel ignored while he remained in solitary confinement and without food until, led to believe that he was going to get a "shellacking," he confessed from apparent fear of his jailors. Finally, I see no similarity in *Haley* v. *Ohio,* 332 U. S. 596 (1948), the last case cited by the Court. There a 15-year-old boy never before in trouble was questioned "through the dead of night" by five to six policemen in relays of one or two each and then only was led to confess by being shown alleged statements of two confederates incriminating him.

Haley does not indicate that youth alone is sufficient to render a juvenile's confession inadmissible. Here we do not have any of the factors which led to the comment: "What transpired would make us pause for careful inquiry if a mature man were involved." *Id.*, at 599.

I regret that without support from prior cases and on the basis of inference and conjecture not supported in the record the Court upsets this conviction.

UNITED STATES *v.* DAVIS ET AL.

CERTIORARI TO THE COURT OF CLAIMS.

No. 190. Argued March 28, 1962.—Decided June 4, 1962.*

Pursuant to a property settlement agreement later incorporated in a divorce decree, a taxpayer in Delaware transferred to his former wife, in return for the release of her marital claims, certain shares of stock which had appreciated in market value and which were solely his property subject to certain inchoate marital rights of the wife, including a right of intestate succession and a right upon divorce to a "reasonable" share of the husband's property. He also paid the fees of her attorney for advice given to her about the tax consequences of the property settlement. *Held:*

1. In these circumstances and in view of pertinent provisions of Delaware law, this transfer of stock is to be considered under the Internal Revenue Code of 1954 not a nontaxable division of property between co-owners but a taxable transfer of property in satisfaction of a legal obligation. Pp. 68–71.

2. On the record in this case, the Commissioner's assessment of a taxable gain based upon the value of the stock at the date of its transfer has not been shown to be erroneous. Pp. 71–74.

3. The amount paid by the husband to his former wife's attorney as a fee for advice given to her about the tax consequences of the property settlement was not deductible by the husband under § 212 (3) of the Internal Revenue Code of 1954. Pp. 74–75.

152 Ct. Cl. 805, 287 F. 2d 168, affirmed in part and reversed in part.

I. Henry Kutz and *Harold C. Wilkenfeld* argued the cause for the United States in both cases. With them on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett, Meyer Rothwacks* and *Arthur I. Gould.*

Converse Murdoch argued the cause and filed briefs for the respondents in No. 190 and petitioners in No. 268.

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*Together with No. 268, *Davis et al.* v. *United States*, also on certiorari to the same Court.

MR. JUSTICE CLARK delivered the opinion of the Court.

These cases involve the tax consequences of a transfer of appreciated property by Thomas Crawley Davis [1] to his former wife pursuant to a property settlement agreement executed prior to divorce, as well as the deductibility of his payment of her legal expenses in connection therewith. The Court of Claims upset the Commissioner's determination that there was taxable gain on the transfer but upheld his ruling that the fees paid the wife's attorney were not deductible. 152 Ct. Cl. 805, 287 F. 2d 168. We granted certiorari on a conflict in the Court of Appeals and the Court of Claims on the taxability of such transfers.[2] 368 U. S. 813. We have decided that the taxpayer did have a taxable gain on the transfer and that the wife's attorney's fees were not deductible.

In 1954 the taxpayer and his then wife made a voluntary property settlement and separation agreement calling for support payments to the wife and minor child in addition to the transfer of certain personal property to the wife. Under Delaware law all the property transferred was that of the taxpayer, subject to certain statutory marital rights of the wife including a right of intestate succession and a right upon divorce to a share of the husband's property.[3] Specifically as a "division in settlement of their property" the taxpayer agreed to transfer to his wife, *inter alia*, 1,000 shares of stock in the E. I. du Pont de Nemours & Co. The then Mrs. Davis agreed to

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[1] Davis' present wife, Grace Ethel Davis, is also a party to these proceedings because a joint return was filed in the tax year in question.

[2] The holding in the instant case is in accord with *Commissioner* v. *Marshman*, 279 F. 2d 27 (C. A. 6th Cir. 1960), but is contra to the holdings in *Commissioner* v. *Halliwell*, 131 F. 2d 642 (C. A. 2d Cir. 1942), and *Commissioner* v. *Mesta*, 123 F. 2d 986 (C. A. 3d Cir. 1941).

[3] 12 Del. Code Ann. (Supp. 1960) § 512; 13 Del. Code Ann. § 1531. In the case of realty, the wife in addition to the above has rights of dower. 12 Del. Code Ann. §§ 502, 901, 904, 905.

accept this division "in full settlement and satisfaction of any and all claims and rights against the husband whatsoever (including but not by way of limitation, dower and all rights under the laws of testacy and intestacy) . . . ." Pursuant to the above agreement which had been incorporated into the divorce decree, one-half of this stock was delivered in the tax year involved, 1955, and the balance thereafter. Davis' cost basis for the 1955 transfer was $74,775.37, and the fair market value of the 500 shares there transferred was $82,250. The taxpayer also agreed orally to pay the wife's legal expenses, and in 1955 he made payments to the wife's attorney, including $2,500 for services concerning tax matters relative to the property settlement.

I.

The determination of the income tax consequences of the stock transfer described above is basically a two-step analysis: (1) Was the transaction a taxable event? (2) If so, how much taxable gain resulted therefrom? Originally the Tax Court (at that time the Board of Tax Appeals) held that the accretion to property transferred pursuant to a divorce settlement could not be taxed as capital gain to the transferor because the amount realized by the satisfaction of the husband's marital obligations was indeterminable and because, even if such benefit were ascertainable, the transaction was a nontaxable division of property. *Mesta* v. *Commissioner,* 42 B. T. A. 933 (1940); *Halliwell* v. *Commissioner,* 44 B. T. A. 740 (1941). However, upon being reversed in quick succession by the Courts of Appeals of the Third and Second Circuits, *Commissioner* v. *Mesta,* 123 F. 2d 986 (C. A. 3d Cir. 1941); *Commissioner* v. *Halliwell,* 131 F. 2d 642 (C. A. 2d Cir. 1942), the Tax Court accepted the position of these courts and has continued to apply these views in appropriate cases since that time, *Hall* v. *Commissioner,*

9 T. C. 53 (1947); *Patino* v. *Commissioner,* 13 T. C. 816 (1949); *Estate of Stouffer* v. *Commissioner,* 30 T. C. 1244 (1958); *King* v. *Commissioner,* 31 T. C. 108 (1958); *Marshman* v. *Commissioner,* 31 T. C. 269 (1958). In *Mesta* and *Halliwell* the Courts of Appeals reasoned that the accretion to the property was "realized" by the transfer and that this gain could be measured on the assumption that the relinquished marital rights were equal in value to the property transferred. The matter was considered settled until the Court of Appeals for the Sixth Circuit, in reversing the Tax Court, ruled that, although such a transfer might be a taxable event, the gain realized thereby could not be determined because of the impossibility of evaluating the fair market value of the wife's marital rights. *Commissioner* v. *Marshman,* 279 F. 2d 27 (1960). In so holding that court specifically rejected the argument that these rights could be presumed to be equal in value to the property transferred for their release. This is essentially the position taken by the Court of Claims in the instant case.

II.

We now turn to the threshold question of whether the transfer in issue was an appropriate occasion for taxing the accretion to the stock. There can be no doubt that Congress, as evidenced by its inclusive definition of income subject to taxation, *i. e.,* "all income from whatever source derived, including . . . [g]ains derived from dealings in property,"[4] intended that the economic growth of this stock be taxed. The problem confronting us is simply *when* is such accretion to be taxed. Should the economic gain be presently assessed against taxpayer, or should this assessment await a subsequent transfer of the property by the wife? The controlling

[4] Internal Revenue Code of 1954 § 61 (a).

statutory language, which provides that gains from dealings in property are to be taxed upon "sale or other disposition," [5] is too general to include or exclude conclusively the transaction presently in issue. Recognizing this, the Government and the taxpayer argue by analogy with transactions more easily classified as within or without the ambient of taxable events. The taxpayer asserts that the present disposition is comparable to a nontaxable division of property between two co-owners,[6] while the Government contends it more resembles a taxable transfer of property in exchange for the release of an independent legal obligation. Neither disputes the validity of the other's starting point.

In support of his analogy the taxpayer argues that to draw a distinction between a wife's interest in the property of her husband in a common-law jurisdiction such as Delaware and the property interest of a wife in a typical community property jurisdiction would commit a double sin; for such differentiation would depend upon "elusive

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[5] Internal Revenue Code of 1954 §§ 1001, 1002.

[6] Any suggestion that the transaction in question was a gift is completely unrealistic. Property transferred pursuant to a negotiated settlement in return for the release of admittedly valuable rights is not a gift in any sense of the term. To intimate that there was a gift to the extent the value of the property exceeded that of the rights released not only invokes the erroneous premise that every exchange not precisely equal involves a gift but merely raises the measurement problem discussed in Part III, *infra*, p. 71. Cases in which this Court has held transfers of property in exchange for the release of marital rights subject to gift taxes are based not on the premise that such transactions are inherently gifts but on the concept that in the contemplation of the gift tax statute they are to be taxed as gifts. *Merrill* v. *Fahs*, 324 U. S. 308 (1945); *Commissioner* v. *Wemyss*, 324 U. S. 303 (1945); see *Harris* v. *Commissioner*, 340 U. S. 106 (1950). In interpreting the particular income tax provisions here involved, we find ourselves unfettered by the language and considerations ingrained in the gift and estate tax statutes. See *Farid-Es-Sultaneh* v. *Commissioner*, 160 F. 2d 812 (C. A. 2d Cir. 1947).

and subtle casuistries which . . . possess no relevance for tax purposes," *Helvering* v. *Hallock,* 309 U. S. 106, 118 (1940), and would create disparities between common-law and community property jurisdictions in contradiction to Congress' general policy of equality between the two. The taxpayer's analogy, however, stumbles on its own premise, for the inchoate rights granted a wife in her husband's property by the Delaware law do not even remotely reach the dignity of co-ownership. The wife has no interest—passive or active—over the management or disposition of her husband's personal property. Her rights are not descendable, and she must survive him to share in his intestate estate. Upon dissolution of the marriage she shares in the property only to such extent as the court deems "reasonable." 13 Del. Code Ann. § 1531 (a). What is "reasonable" might be ascertained independently of the extent of the husband's property by such criteria as the wife's financial condition, her needs in relation to her accustomed station in life, her age and health, the number of children and their ages, and the earning capacity of the husband. See, *e. g., Beres* v. *Beres,* 52 Del. 133, 154 A. 2d 384 (1959).

This is not to say it would be completely illogical to consider the shearing off of the wife's rights in her husband's property as a division of that property, but we believe the contrary to be the more reasonable construction. Regardless of the tags, Delaware seems only to place a burden on the husband's property rather than to make the wife a part owner thereof. In the present context the rights of succession and reasonable share do not differ significantly from the husband's obligations of support and alimony. They all partake more of a personal liability of the husband than a property interest of the wife. The effectuation of these marital rights may ultimately result in the ownership of some of the husband's

property as it did here, but certainly this happenstance does not equate the transaction with a division of property by co-owners. Although admittedly such a view may permit different tax treatment among the several States, this Court in the past has not ignored the differing effects on the federal taxing scheme of substantive differences between community property and common-law systems. *E. g., Poe* v. *Seaborn,* 282 U. S. 101 (1930). To be sure Congress has seen fit to alleviate this disparity in many areas, *e. g.,* Revenue Act of 1948, 62 Stat. 110, but in other areas the facts of life are still with us.

Our interpretation of the general statutory language is fortified by the long-standing administrative practice as sounded and formalized by the settled state of law in the lower courts. The Commissioner's position was adopted in the early 40's by the Second and Third Circuits and by 1947 the Tax Court had acquiesced in this view. This settled rule was not disturbed by the Court of Appeals for the Sixth Circuit in 1960 or the Court of Claims in the instant case, for these latter courts in holding the gain indeterminable assumed that the transaction was otherwise a taxable event. Such unanimity of views in support of a position representing a reasonable construction of an ambiguous statute will not lightly be put aside. It is quite possible that this notorious construction was relied upon by numerous taxpayers as well as the Congress itself, which not only refrained from making any changes in the statutory language during more than a score of years but re-enacted this same language in 1954.

III.

Having determined that the transaction was a taxable event, we now turn to the point on which the Court of Claims balked, *viz.,* the measurement of the taxable gain realized by the taxpayer. The Code defines the taxable

gain from the sale or disposition of property as being the "excess of the amount realized therefrom over the adjusted basis . . . ." I. R. C. (1954) § 1001 (a). The "amount realized" is further defined as "the sum of any money received plus the fair market value of the property (other than money) received." I. R. C. (1954) § 1001 (b). In the instant case the "property received" was the release of the wife's inchoate marital rights. The Court of Claims, following the Court of Appeals for the Sixth Circuit, found that there was no way to compute the fair market value of these marital rights and that it was thus impossible to determine the taxable gain realized by the taxpayer. We believe this conclusion was erroneous.

It must be assumed, we think, that the parties acted at arm's length and that they judged the marital rights to be equal in value to the property for which they were exchanged. There was no evidence to the contrary here. Absent a readily ascertainable value it is accepted practice where property is exchanged to hold, as did the Court of Claims in *Philadelphia Park Amusement Co.* v. *United States,* 130 Ct. Cl. 166, 172, 126 F. Supp. 184, 189 (1954), that the values "of the two properties exchanged in an arms-length transaction are either equal in fact, or are presumed to be equal." Accord, *United States* v. *General Shoe Corp.,* 282 F. 2d 9 (C. A. 6th Cir. 1960); *International Freighting Corp.* v. *Commissioner,* 135 F. 2d 310 (C. A. 2d Cir. 1943). To be sure there is much to be said of the argument that such an assumption is weakened by the emotion, tension and practical necessities involved in divorce negotiations and the property settlements arising therefrom. However, once it is recognized that the transfer was a taxable event, it is more consistent with the general purpose and scheme of the taxing statutes to make a rough approximation of the gain realized thereby than to ignore altogether its tax

consequences. Cf. *Helvering* v. *Safe Deposit & Trust Co.*, 316 U. S. 56, 67 (1942).

Moreover, if the transaction is to be considered a taxable event as to the husband, the Court of Claims' position leaves up in the air the wife's basis for the property received. In the context of a taxable transfer by the husband,[7] all indicia point to a "cost" basis for this property in the hands of the wife.[8] Yet under the Court of Claims' position her cost for this property, *i. e.*, the value of the marital rights relinquished therefor, would be indeterminable, and on subsequent disposition of the property she might suffer inordinately over the Commissioner's assessment which she would have the burden of proving erroneous, *Commissioner* v. *Hansen*, 360 U. S. 446, 468 (1959). Our present holding that the value of these rights is ascertainable eliminates this problem; for the same calculation that determines the amount received by the husband fixes the amount given up by the wife, and this figure, *i. e.*, the market value of the property transferred by the husband, will be taken by her as her tax basis for the property received.

Finally, it must be noted that here, as well as in relation to the question of whether the event is taxable, we

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[7] Under the present administrative practice, the release of marital rights in exchange for property or other consideration is not considered a taxable event as to the wife. For a discussion of the difficulties confronting a wife under a contrary approach, see Taylor and Schwartz, Tax Aspects of Marital Property Agreements, 7 Tax L. Rev. 19, 30 (1951); Comment, The Lump Sum Divorce Settlement as a Taxable Exchange, 8 U. C. L. A. L. Rev. 593, 601–602 (1961).

[8] Section 1012 of the Internal Revenue Code of 1954 provides that: "The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). . . ."

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draw support from the prior administrative practice and judicial approval of that practice. See p. 71, *supra*. We therefore conclude that the Commissioner's assessment of a taxable gain based upon the value of the stock at the date of its transfer has not been shown erroneous.[9]

IV.

The attorney-fee question is much simpler. It is the customary practice in Delaware for the husband to pay both his own and his wife's legal expenses incurred in the divorce and the property settlement. Here petitioner paid $5,000 of such fees in the taxable year 1955 earmarked for tax advice in relation to the property settlement. One-half of this sum went to the wife's attorney. The taxpayer claimed that under § 212 (3) of the 1954 Code, which allows a deduction for the "ordinary and necessary expenses paid . . . in connection with the determination, collection, or refund of any tax," he was entitled to deduct the entire $5,000. The Court of Claims allowed the $2,500 paid taxpayer's own attorney but denied the like amount paid the wife's attorney. The sole question here is the deductibility of the latter fee; the Government did not seek review of the amount taxpayer paid his own attorney, and we intimate no decision on that point. As to the deduction of the wife's fees, we read the statute, if applicable to this type of tax expense, to include only the expenses of the taxpayer himself and not those of his wife. Here the fees paid her attorney do not appear to be "in connection with the determination, collection, or refund" of any tax of the taxpayer. As the Court of Claims found, the wife's attorney "considered the problems from the standpoint of his client alone. Cer-

[9] We do not pass on the soundness of the taxpayer's other attacks upon this determination, for these contentions were not presented to the Commissioner or the Court of Claims.

tainly then it cannot be said that . . . [his] advice was directed to plaintiff's tax problems . . . ." 152 Ct. Cl., at 805, 287 F. 2d, at 171. We therefore conclude, as did the Court of Claims, that those fees were not a deductible item to the taxpayer.

Reversed in part and affirmed in part.

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 79. Argued January 17–18, 1962.—Decided June 4, 1962.

Under § 8c of the Agricultural Adjustment Act, as amended and re-enacted by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture issued orders regulating the marketing of milk in the New York-New Jersey region. To protect the prices received by milk producers in that region, he included in the orders a provision in effect requiring those who buy milk elsewhere and bring it into the region for sale as fluid milk to pay to the producers who regularly supply the region a "compensatory payment" equal to the difference between the minimum price set by the Market Administrator for fluid milk and the minimum price for surplus milk in the region. *Held:* This requirement is invalid, because it conflicts with § 8c (5) (G) of the Act, which, as shown by its legislative history, was intended by Congress to prevent the Secretary from setting up trade barriers to the importation of milk from other production areas in the United States. Pp. 77–100.

287 F. 2d 726, reversed.

Willis F. Daniels argued the cause for petitioners. With him on the briefs was *Donn L. Snyder.*

Alan S. Rosenthal argued the cause for the United States and the Secretary of Agriculture. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick, Neil Brooks* and *Pauline B. Heller.*

Briefs of *amici curiae,* urging affirmance, were filed by *Frederic P. Lee, John A. Cardon, Leslie H. Deming, Frederick U. Conard, Jr., Thomas O. Berryhill, George M. St. Peter* and *Reuben Hall* for the Dairymen's League Cooperative Assn., Inc., et al.; *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Robert G. Blabey* for the State of New York; *Thomas Debevoise,* Attorney General of Vermont, *Albert*

L. Coles, Attorney General of Connecticut, and *Reuben Hall* for the States of Vermont and Connecticut; and *David D. Furman,* Attorney General of New Jersey, and *William L. Boyan,* Deputy Attorney General, for Floyd R. Hoffman, Director of the Office of Milk Industry of New Jersey.

Briefs urging reversal were filed by *Walter F. Mondale,* Attorney General, and *Sydney Berde,* Deputy Attorney General, for the State of Minnesota, as *amicus curiae.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioners, operating milk processing plants in Pennsylvania, challenge the validity of certain "compensatory payment" provisions included in milk marketing orders affecting the New York-New Jersey area, which were promulgated by the Secretary of Agriculture under the authority granted him by § 8c of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 608c. That section permits the Secretary to issue regional regulations governing, in various enumerated respects, the marketing of certain agricultural commodities, among which is milk. This provision in question requires those who buy milk elsewhere and bring it into the region for sale as fluid milk to pay to the farmers who supply the region a fixed amount as a "compensatory payment." This amount is measured by the difference between the minimum price set by the Market Administrator for fluid milk and the minimum price for surplus milk. The judgment of the Court of Appeals for the Third Circuit, 287 F. 2d 726, upholding the validity of the "compensatory payment" provision here under attack,[1] conflicted with an earlier

[1] The petitioners instituted this action challenging the validity of the compensatory payment provision by filing administrative petitions with the Secretary of Agriculture pursuant to § 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 608c (15) (A). The Hearing Examiner sustained the petitioners'

decision rendered by the Court of Appeals for the Second Circuit, *Kass* v. *Brannan,* 196 F. 2d 791. To resolve this conflict we granted certiorari. 366 U. S. 957.

I.

The General Scheme of Milk Regulation.

The order around which the present controversy centers, now titled Milk Marketing Order No. 2, 7 CFR §§ 1002.1 *et seq.*,[2] though somewhat more complex than others, is in its general outline representative of the pattern of regulation established by the Secretary for the promotion of orderly marketing conditions in the milk industry and the preservation of minimum prices for farmers. Pursuant to the authority granted by § 8c (5)(A),[3] the Order classifies milk that is sold within

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contentions on the authority of *Kass* v. *Brannan,* 196 F. 2d 791, but the Judicial Officer, acting on behalf of the Secretary of Agriculture, dismissed the petitions.

Petitioners then sought review of the Secretary's ruling in the District Court under § 8c (15)(B) of the Act. The review proceedings were consolidated with enforcement actions brought by the Government pursuant to § 8a (6) of the Act. The District Court, relying on *Kass* v. *Brannan, supra,* held that the payment provision was invalid. 183 F. Supp. 80. It was this decision that was reversed by the Court of Appeals. 287 F. 2d 726.

[2] A general reorganization of Chapter IX of Title 7 of the Code of Federal Regulations during the past year has resulted in redesignation of most of the milk marketing orders. The New York-New Jersey Order had previously been designated as Milk Marketing Order No. 27 and had been found at 7 CFR § 927. The section references and the contents of the regulations as quoted throughout this opinion are as they were in effect on January 1, 1962.

[3] Section 8c (5)(A) provides:

"(5) *Milk and its products; terms and conditions of orders.*

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and condi-

the New York-New Jersey marketing area "in accordance with the form in which or the purpose for which it is used." Milk that contains 3% to 5% butterfat—the usual proportion in ordinary liquid milk—and is sold for fluid consumption is assigned to Class I. Milk that is used for cream (sweet and sour), half and half, or milk drinks containing less than 3% or more than 5% butterfat is classified in Class II. The remainder—milk that is to be stored for a substantial period and used for dairy products such as butter and cheese—is grouped in Class III. 7 CFR § 1002.37.

This classification reflects the relative prices usually commanded by the different forms of milk. Thus, highest prices are paid for milk used for fluid consumption, and the lowest for milk which is to be processed into butter and cheese. Since the supply of milk is always greater than the demands of the fluid-milk market, the excess must be channeled to the less desirable, lower-priced outlets. It is in order to avoid destructive competition among milk producers for the premium outlets that the statute authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which

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tions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers." 7 U. S. C. § 608c (5)(A).

it leaves the plant and its ultimate use. Adjustments are then made among the handlers so that each eventually pays out-of-pocket an amount equal to the actual utilization value of the milk he has bought.

Under the Marketing Order here in question it is primarily the handlers whose plants are located within the marketing area and who regularly supply that area with fluid milk who are regulated. *All* handlers who receive or distribute milk within the area are required to submit monthly reports to the Market Administrator, listing the quantity of milk they have handled and the use for which it was sold. But only the handlers operating "pool plants"—*i. e.*, plants which meet certain standards set out in 7 CFR §§ 1002.25–1002.29 [4]—must pay the producers from whom they buy the uniform price set by the Administrator. This price is calculated each month on the basis of the reports that are submitted. After determining the minimum prices for each use classification pursuant to formulas set out in 7 CFR § 1002.40, the Administrator computes an average price for the "pool" milk handled during that month. This figure is reached by first multiplying the "pool" milk disposed of in each class by the established minimum price for that class, and then adding the products to the "compensatory payments" made for nonpool milk. After certain minor adjustments are made, this sum is divided by the total quantity of "pool" milk sold in the market during the month. The quotient is a "blend price." With some adjustments to reflect transportation expenses, this uniform price must be paid to producers by all handlers maintaining "pool" plants. 7 CFR § 1002.66.

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[4] These provisions establish certain performance requirements aimed at insuring that the plant continues to provide fluid milk to the marketing area even in periods of short supply. Thus, it is primarily the handlers whose main concern is the marketing area who qualify for the "pool."

Adjustments among handlers are made by way of a "Producer Settlement Fund," into which each handler contributes the excess of his "use value" [5] over the uniform price paid by him to his producer. Handlers whose "use value" of the milk they purchase is less than the "blend price" they are required to pay may withdraw the difference from the fund. The net effect is that each handler pays for his milk at the price he would have paid had it been earmarked at the outset for the use to which it was ultimately put. But the farmer who produces the milk is protected from the effects of competition for premium outlets since he is automatically allotted a proportional share of each of the different "use" markets.

II.

The Compensatory Payment Provision.

It will thus be seen that this system of regulation contemplates economic controls only over "pool-handler" plants since only such handlers are required to pay the "blend price" to their producers and to account to the Producer Settlement Fund. If limited to the provisions recounted above, the regulatory scheme would not affect milk brought into the New York-New Jersey marketing area by handlers who are primarily engaged in supplying some other market and whose producers are not located within the New York-New Jersey area. Some of the regional orders now in effect do not undertake any economic regulation of "outside" or "other source" milk.[6] But it is quite obvious that under certain circumstances some regulation of such milk may be necessary. Accord-

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[5] "Use value" is the price the handler would have had to pay, at prevailing minimum rates, had he purchased his milk at a price reflecting its ultimate disposition.

[6] See 7 CFR §§ 1034 (Dayton-Springfield), 1037 (North Central Ohio), 1038 (Rockford-Freeport), 1074 (Southwest Kansas).

ingly, § 8c (7)(D) of the Act, 7 U. S. C. § 608c (7)(D), authorizes the Secretary to include in his regulating orders conditions that are incidental to terms expressly authorized by the statute, and that are "necessary to effectuate the other provisions of such order."

A handler who brings outside milk into a marketing area may disrupt the regulatory scheme in at least two respects:

(1) *Pool handlers* in the marketing area who are required to pay the minimum class prices for their milk may find their selling prices undercut by those of nonpool handlers dealing in outside milk purchased at an unregulated price.

(2) *Producers* in the marketing area, whose "blend price" depends on how much of the relatively constant fluid-milk demand they supply in a given month, may find the outside milk occupying a portion of the premium market, thus displacing the "pool" milk and forcing it into the less rewarding surplus uses, with the ultimate effect of diminishing the "blend price" payable to producers.

In an effort to cope with these disruptive economic forces, the Secretary devised his "compensatory payment" plan. In essence the plan imposes special monetary exactions on handlers introducing "outside" milk for fluid consumption into a marketing area in months when there is a substantial surplus of milk on the market.[7]

Of the 68 regional milk orders which establish marketwide pools,[8] 64 contain "compensatory payment" provi-

[7] The payment provision of 7 CFR § 1002.83 applies only in those months when the volume of milk sold for Class III use exceeds 15% of the total pool milk reported in the marketing area.

[8] The Act authorizes the establishment of either marketwide pools or individual handler pools. Since the latter require only that each handler pay uniform prices to all the producers from which he buys, but does not impose a uniformity requirement among the various

sions of one kind or another. The Order now before us is typical of 23 of these orders.[9] The Order provides that a handler who brings "outside" milk into the New York-New Jersey area and sells it for fluid use must pay to the pool's producers, through the Producer Settlement Fund, an amount equal to the difference between the minimum prices for the highest and for the lowest use classifications prevailing in that area. In other words, for each hundredweight of nonpool milk sold for Class I use in the New York-New Jersey area, a payment equal to the difference between Class I and Class III prices must be made by the seller to the Producer Settlement Fund.

III.

The Purpose and Effect of the Compensatory Payment.

After the Court of Appeals for the Second Circuit had held the compensatory payment requirement in the New York-New Jersey Milk Marketing Order (then Order No. 27) to be a "penalty," *Kass* v. *Brannan,* 196 F. 2d

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handlers, there is no need for adjustments among handlers. Consequently, no compensatory payment provision is included in orders establishing individual handler pools. See 7 CFR §§ 1004 (Philadelphia), 1005 (Tri-State), 1010 (Wilmington), 1039 (Milwaukee), 1041 (Toledo), 1044 (Michigan Upper Peninsula), 1078 (North Central Iowa), 1096 (Northern Louisiana), 1097 (Memphis), 1102 (Fort Smith), 1129 (Austin-Waco), 1130 (Corpus Christi), 1134 (Western Colorado).

[9] Compare 7 CFR §§ 1001.65 (Greater Boston), 1003.62 (Washington, D. C.), 1006.65 (Springfield, Mass.), 1007.65 (Worcester), 1008.54 (Wheeling), 1009.54 (Clarksburg, W. Va.), 1011.62 (Appalachian), 1014.46 (Southeastern New England), 1015.46 (Connecticut), 1016.62 (Upper Chesapeake Bay), 1030.61 (Chicago), 1031.70 (b) (South Bend-La Porte-Elkhart), 1036.84 (b) (Northeastern Ohio), 1048.54 (Greater Youngstown-Warren), 1061.54 (St. Joseph), 1068.70 (b) (Minneapolis-St. Paul), 1071.62 (b) (Neosho Valley), 1072.55 (Sioux Falls-Mitchell), 1106.55 (Oklahoma), 1125.70 (Puget Sound), 1126.70 (d) (North Texas), 1133.70 (b) (Inland Empire).

791, 795, the Secretary of Agriculture conducted extensive hearings to determine whether it should be retained. His findings, which appear at 18 Fed. Reg. 8444–8454, explain this requirement as the most satisfactory means of imposing "a suitable charge on such unpriced milk in an amount sufficient to neutralize, compensate for and eliminate the artificial economic advantage for non-pool milk which necessarily is created by the classified pricing and pooling of pool milk under the order." *Id.*, at 8448. There seems little doubt that an assessment equal to the Class I-Class III differential would, in all but rare instances, nullify any competitive advantage that non-pool milk could have: only if the sum of the purchase price of the outside milk and the cost of its transportation to market were less than the Class III price would a handler find it profitable to bring such milk into the marketing area. But it must be obvious that this payment is wholly or partially "compensatory"—*i. e.*, puts pool and nonpool milk "on substantially similar competitive positions at source" (*ibid.*)—only if the milk has been purchased at not more than the Class III price. If the purchase price of the nonpool milk exceeds the Class III price within the area, the effect of the fixed compensatory payment is to make it economically unfeasible for a handler to bring such milk into the marketing area.

The Secretary of Agriculture's determination that the Class I-Class III differential was the most suitable compensatory figure rested upon what was, in effect, an irrebuttable presumption that the nonpool milk was purchased at a rate commensurate with the value of "surplus" (Class III) milk. See 18 Fed. Reg., at 8448.[10]

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[10] "As stated earlier herein, all milk which is established to be primarily associated with the New York milk marketing area under the standards prescribed by the order is included in the New York pool. Conversely, the non-pool milk which enters the marketing area for fluid use originates from plants which are not sufficiently associated

That presumption was based in turn on the supposition that the nonpool milk could not have been worth more than the Class III price where purchased since it could not be shipped elsewhere for Class I use. But it must

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with the New York market to have their milk in the pool. Such plants have their primary interests in other fluid markets or specialized manufacturing uses and frequently have more milk than is required for these primary purposes. It is this surplus milk at nonpool plants which can be 'dumped' into the New York market for fluid use, provided only that the plant and the milk [have] marketing area health approval. The operator of such a non-pool plant has a choice of using the excess milk for surplus uses (ordinarily in the manufacture of various milk products) or of sending it to the New York marketing area for fluid uses. In making this decision he will compare the respective net returns to him for this surplus milk and will naturally select the fluid alternative, for it will yield the greater return. In the absence of classified pricing, his cost, at source, for the excess milk remains exactly the same whether he uses it for surplus disposition or for fluid use. The pool plant operator on the other hand has no such advantage for he pays a higher classified price, at source, if he sells the milk in the market area for fluid use (Class I–A or II) than if he disposes of it for surplus manufacturing uses (Class III).

"If this artificial advantage in favor of surplus non-pool milk at the plant of origin is to be effectively removed, as it must be, the milk must be treated and evaluated for what it actually is, namely surplus milk in the milkshed. If New York marketing area disposition were not available for this surplus, the non-pool handler could derive from it only its surplus value. This surplus value is its true value or 'opportunity cost' and such surplus value should be used as the subtrahend in the formula for compensation payments on non-pool milk from plants not subject to a Federal order.

"The Class III price under the New York order is the class price which is payable, at source, for pool milk under the New York order when used for most surplus uses. It is expressly designed to fix a proper classified value, at source, for surplus milk. The Class III price closely approximates the amount paid in the Northeast to farmers not under the New York order for so much of their milk as is used for general manufacture.

"It is therefore a dependable indicator of the value of surplus milk at source. If a non-pool handler, for his own reasons, chooses to pay

be apparent that it is only if the milk is denied access to other marketing areas or if a prohibitive payment is assessed on its use elsewhere that it will depreciate in value to Class III levels. For if the milk can be freely shipped elsewhere for fluid use or if it is purchased in an area where prices paid to producers are regulated, it will command a higher price.

Indeed, the facts of the case now before us demonstrate the shortcomings of the Secretary's reasoning. One of the petitioners, Suncrest Farms, Inc., purchases its milk in Pennsylvania under regulations established by the Pennsylvania Milk Control Commission. In September 1957, which was one of the months during which it sought to sell its milk in the New York-New Jersey Marketing Area, Suncrest was required to pay $6.40 per cwt. for the milk it purchased from dairy farmers in Pennsylvania. The Class I-Class III differential in the New York-New Jersey Marketing Area during that month was $2.78 per cwt. Thus, if the "compensatory payment" were assessed, Suncrest would actually be forced to pay $9.18 per cwt. for fluid milk sold in the area, while the handlers maintaining pool plants in the area would pay only the Class I price, which was $6.23 in August 1957.[11]

If competitive parity among *handlers* of pool and nonpool milk were the only objective of the Secretary's "compensatory" regulation, other marketing orders of the Secretary show that this result has been achieved without imposing unnecessary hardships, virtually "trade

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more than its true market value, at source, for surplus milk which he sends to the New York area, the pool should not underwrite this unnecessary cost, particularly since the premium can be used to outbid pool handlers for milk, as previously shown."

[11] The fact that petitioners were paying more for their milk than the Class I price in the New York-New Jersey Marketing Area leaves no room for any suggestion that they will be receiving a "windfall" if it is ultimately adjudged that they are entitled to have returned the full amount of their compensatory payments.

barriers" as in the instance just given,[12] on the nonpool milk.[13]

It is in considering the effect of the present compensatory payment provision on the pool *producers,* however,

[12] The total amount of the compensatory payments involved in this litigation, embracing a period of approximately four years, was some $617,000 as to Lehigh Valley and $108,000 as to Suncrest.

[13] Several of the marketing orders make the compensatory payment equal the difference between the Class I price in the marketing area and the actual cost of the nonpool milk. See 7 CFR §§ 1042.60 (Muskegon), 1128.62 (b) (Central West Texas). In some marketing areas the handler who deals in nonpool milk is permitted to elect each month between paying the fluid milk-surplus use differential and paying the difference between his actual cost and the minimum regional price for Class I milk. See 7 CFR §§ 1013.62 (Southeastern Florida), 1033.61 (Greater Cincinnati), 1035.63 (Columbus, Ohio), 1040.66 (Southern Michigan), 1043.84 (Upstate Michigan), 1045.83 (Northeastern Wisconsin), 1047.62 (Fort Wayne), 1064.61 (Greater Kansas City), 1065.62 (Nebraska-Western Iowa), 1067.61 (Ozarks), 1069.62 (Duluth-Superior), 1073.62 (Wichita), 1094.62 (New Orleans), 1098.92 (Nashville), 1103.62 (Central Mississippi), 1105.62 (Mississippi Delta), 1107.61 (Mississippi Gulf Coast), 1131.62 (Central Arizona), 1135.62 (Colorado Springs-Pueblo), 1136.62 (Great Basin), 1137.62 (Eastern Colorado).

Other marketing orders, applicable in some areas, assess a compensatory payment equal to the difference between the "blend price" paid in the area for pool milk and the Class I price, thus treating the handler of nonpool milk as if he were a member of the pool with respect to such milk as he introduced into the marketing area.

Where this differential is accepted as the measure of the compensatory payment it is done only in those months when the surplus is lowest. In the spring and summer months the fluid milk-surplus use differential is exacted. See 7 CFR §§ 1032.55 (b) (Suburban St. Louis, August–February), 1046.55 (b) (Ohio Valley, August–March), 1049.55 (b) (Indianapolis, August–March), 1062.55 (b) (St. Louis, August–February), 1063.63 (b) (Quad Cities-Dubuque, July–November), 1066.57 (a) (Sioux City, August–February), 1070.63 (b) (Cedar Rapids-Iowa City, July–November), 1075.63 (b) (Black Hills, July–March), 1076.63 (b) (Eastern South Dakota, July–February), 1079.63 (b) (Des Moines, July–March), 1090.54 (b) (Chattanooga, August–February), 1095.70 (e) (2) (Louisville-Lexington, October–De-

that the principal concern of the Secretary becomes quite apparent. As has been noted (p. 82, *supra*), the sale for fluid use of nonpool milk in the marketing area displaces pool milk that might otherwise be used for this premium outlet. Since the market area's "blend price" is computed only with reference to the pool milk, the effect of the entry of nonpool milk is to drive down the price that

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cember), 1099.62 (a) (Paducah, August–March), 1101.93 (b) (Knoxville, August–February), 1104.53 (b) (Red River Valley, August–January), 1108.54 (b) (Central Arkansas, August–February), 1127.65 (b) (San Antonio, January and August), 1132.63 (b) (Texas Panhandle, July–February).

The latter method treats the handler of nonpool milk who buys at a price in excess of the blend price as if he were a member of the pool since a handler in the pool may, if he chooses, pay his producer *more* than the "blend price" set by the Market Administrator, see *Stark* v. *Wickard*, 321 U. S. 288, 291, but must still account to the Producer Settlement Fund as if he had paid only the "blend price." By treating nonpool milk in the same manner, the Secretary might be able to justify a compensatory payment equal to the difference between the nonpool milk's "use value" and the "blend price," though we do not decide the question. See generally Hutt, Restrictions on the Free Movement of Fluid Milk Under Federal Milk Marketing Orders, 37 U. Det. L. J. 525, 564–577 (1960).

The suggestion that a nonpool handler would be given a competitive advantage under either of these methods because, in the words of the Judicial Officer, he does not have "to equalize his utilization" as do pool handlers is demonstrably unsound. Insofar as the handlers' *sale* of milk is concerned, neither pool nor nonpool handlers are required to share or "equalize" their proceeds with others. To the extent that this contention relates to the handlers' *purchase* of milk and is meant to suggest that nonpool handlers will find it easier to buy milk because they will be able to pay higher prices to their producers, the exaction of a Class I-blend price payment would effectively discourage purchases in excess of the blend price (which is what the pool's producers are paid). And the assertion that the pool "carries the surplus burden for outside handlers" is based on the same mistaken reasoning as underlies the Secretary's determination to retain the Class I-Class III payment after *Kass* v. *Brannan*, *supra*. See pp. 84–86, *supra*.

is paid to producers in the area. A close examination of the workings of the present compensatory payment provision reveals that its effect is to preserve for the benefit of the area's producers the blend price that they would receive if all outside milk were physically excluded and they alone would supply the fluid-milk needs of the area. For every cwt. of pool milk that is forced into "surplus" use by the entry of nonpool milk, the handler introducing the outside milk is required to pay for the benefit of the area's producers the difference between the value the pool milk would have had if the nonpool milk had never entered and the value it has once the nonpool milk is sold for fluid use.[14] In effect, therefore, the nonpool milk is

[14] A highly simplified illustration serves to clarify this effect: If the Class I price on a given date is $6 per cwt. and the Class III price is $3 per cwt., and if 2,000 cwt. are consumed as fluid milk and another 2,000 cwt. are produced by the dairy farmers in the area and utilized for surplus uses, the computation of the blend price would be as follows:

Table A.

Class I	2,000 x 6.00 equals	12,000
Class III	2,000 x 3.00 equals	6,000
Totals	4,000 at	18,000
Blend Price		$4.50

If 500 cwt. are then brought in from the outside as nonpool milk and sold for Class I use, 500 cwt. of the pool milk will drop into Class III (since the fluid milk demand remains relatively constant):

Table B.

Class I	1,500 x 6.00 equals	9,000
Class III	2,500 x 3.00 equals	7,500
Totals	4,000 at	16,500
Blend Price		$4.125

The producers in the pool would thereby be receiving $.375 less per cwt. than had the nonpool milk stayed out altogether. By distributing to them (through the exaction made of nonpool handlers) the difference between Class I and Class III prices multiplied by the

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forced to subsidize the pool milk and insulate the pool milk from the competitive impact caused by the entry of outside milk. This was recognized by the Court of Appeals which held that such a compensatory payment

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amount of nonpool milk sold in the area as Class I, that deficit is restored. Thus,

Table C.

(Nonpool milk sold as Class I) x (Class I minus Class III)

equals

(Loss to pool by displacement of Class I outlet)

or

500 x 3.00 equals 1,500
1,500 divided by 4,000 cwt. equals .375 per cwt.

The Secretary's formula, therefore, precisely accomplishes the restoring to the pool's producers whatever they have lost by reason of the occupation of their Class I outlet by the nonpool milk.

It should be noted that the actual computation of the blend price, as set out in 7 CFR § 1002.66, achieves this same result in an indirect fashion. Instead of computing the blend price without reference to any nonpool milk, the Secretary's formula includes the compensatory payments within the list of minimum-price obligations that are added in determining the total proceeds for milk sold within the area. 7 CFR § 1002.66 (c). But the blend price is then computed by dividing this sum by the amount of "milk delivered by producers," *i. e.*, pool milk. Consequently, the actual computation of the uniform price under the above illustration would be as follows:

Table D.

Class I	1,500 x 6.00 equals	9,000
Class III	2,500 x 3.00 equals	7,500
Compensatory payments (nonpool milk)	500 x 3.00 equals	1,500
Totals (pool milk)	4,000 at	18,000
Blend Price	$4.50	

The funds paid into the Producer Settlement Fund by the handlers dealing in nonpool milk are then available to the pool handlers, whose credits from the Fund will be larger to the extent that they have been forced to pay a higher blend price.

was "designed to compensate the pool for the loss of the Class I fluid milk utilization and . . . protect the uniform blend price in the marketing area." 287 F. 2d, at 730. It is only if the Secretary has been authorized by the statute to impose such economic trade barriers on the entry of milk into an area so as to protect the prices received by the pool producers that the present compensatory payment plan can be sustained as "necessary to effectuate" the expressly authorized provisions of this Order.

IV.

Section 8c (5)(G).

Section 8c (5)(G) of the Act, however, taken in light of its legislative history, indicates that the regulation here imposed by the Secretary was of the sort that Congress intended to forbid. Section 8c (5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

This provision was first enacted into law as part of the Agricultural Adjustment Act of 1935, 49 Stat. 750, amending the Agricultural Adjustment Act of 1933, 48 Stat. 31. It was re-enacted as part of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, which reaffirmed the marketing order provisions of the 1935 Act after the processing tax had been struck down as unconstitutional in *United States* v. *Butler,* 297 U. S. 1.

Along with enumerating the powers granted to the Secretary of Agriculture so as to avoid the "delegation" problems brought to light by the then recent decision in *Schechter* v. *United States,* 295 U. S. 495, the Congress

sought in 1935 to limit the Secretary's powers so as to prevent him from establishing "trade barriers." Midwestern legislators were particularly concerned over this possibility. When the reported bill which contained no provision like the present § 8c (5)(G) came to the floor of the House of Representatives, Representative Andresen of Minnesota suggested that the Secretary might use his powers to "stop the free flow in commerce . . . of dairy products." He received an assurance from Representative Jones, the Chairman of the House Committee on Agriculture, that the Secretary was not authorized to require anything more of milk coming into a marketing area than that it "comply with the same conditions which the farmers and distributors comply with in that region." 79 Cong. Rec. 9462.[15] An amendment to the bill clarifying this position was then offered by Representative

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[15] "Mr. ANDRESEN. Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?

"Mr. JONES. No. There is nothing in the bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply with in that region.

"Mr. ANDRESEN. That is, sanitary regulations?

"Mr. JONES. Sanitary and other uniform regulations; *but he cannot set up any trade barriers which would keep them out.*

"Mr. ANDRESEN. A great many Members have inquired about that feature, and I just wanted the gentleman to bring that out.

"Mr. JONES. The amendments require a uniform price and uniform set of conditions and fair distribution. In the first place, I do not believe we could give authority to set up these barriers. In the second place, the bill does not do that. It simply enables them to have a program in one of these regions, and in developing these orders which the Secretary issues, he uses the word 'region' wherever possible. Those on the outside must come into that." (Emphasis added.)

Sauthoff of Wisconsin, 79 Cong. Rec. 9493,[16] but no action was taken on that proposal.

On the next day, Representative Andresen proposed from the floor of the House the forerunner to the present § 8c (5)(G). 79 Cong. Rec. 9572. His amendment took the following form:

> "(g) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

There was no objection to the addition of this language, Representative Jones remarking that "[i]t is simply clarifying." *Ibid.* But when Representative Sauthoff sought to change the amendment by substituting the words "limit or tend to limit" for "prohibit," Representative Jones objected on the ground that necessary milk classification and minimum pricing for the protection of outside milk producers regularly supplying their own marketing area would "tend to limit" the introduction of their milk into other areas.[17] *Ibid.*

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[16] The proposed amendment read:

"Sec. — (b) No marketing agreement, order, or regulation shall contain any term or provision which will tend to result in preventing or hindering any agricultural commodity or product thereof produced in any region or area of the United States from being brought into or sold in any other such region or area, or shall have the effect of subsidizing the production or sale of any agricultural commodity or product thereof in any such region or area, in such a manner that such commodity or product thereof will tend to be sold in such other region or area at prices which will tend to depress prices therein of such commodity or product thereof."

[17] "Mr. JONES. Mr. Chairman, the adoption of the amendment of the gentleman from Wisconsin would absolutely wreck the whole milk program. In order to get away from the terrific conditions that have prevailed in the milk industry there is provided in the bill

The House bill, with the language added by Representative Andresen's amendment, went to the Senate. Accompanying the bill to the floor was S. Rep. No. 1011, 74th Cong., 1st Sess., which stated, at p. 11:

> "To prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market by the introduction of new producers or new producing areas, orders may provide that for the first 3 months

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authority to fix a minimum price to producers. That, at least in a measure, would limit or tend to limit shipment, and yet the gentleman, I am sure, does not want to interfere with the price to producers. Then it is a universal custom in the marketing of milk to classify milk. This, in a way, is a limitation. . . .

"Mr. BOILEAU. . . . Mr. Chairman, I should like to ask the distinguished chairman of the committee if in his opinion there is anything in this bill that gives to the Secretary of Agriculture or to anyone else any power to restrict the free flow of milk or any other commodity between the various States?

"Mr. JONES. No; there is nothing in it that will do that. The only tendency is to make all sections comply with the same rules.

. . . . . .

"Mr. HULL. . . . Mr. Chairman, if there is nothing in this bill which would authorize the Secretary of Agriculture or any subordinate so to limit transportation or shipment of dairy products from one State into another, then the amendment of the gentleman from Minnesota as amended by the amendment of the gentleman from Wisconsin [Mr. Sauthoff] can do no harm.

"The three States of Minnesota, Iowa, and Wisconsin, produce about 45 percent of the butter made in this country and we are interested in this matter of the shipment of dairy products to other States.

"Mr. JONES. Mr. Chairman, will the gentleman yield?

"Mr. HULL. I yield.

"Mr. JONES. Would the gentleman object to the requirement that Chicago dealers pay the Wisconsin producer a minimum price?

"Mr. HULL. Not at all.

"Mr. JONES. That certainly would tend to limit."

> of regular delivery, payments shall be made to producers not theretofore selling milk in the area covered by the order at the price fixed for the lowest use classification. *This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 3-month period.*" (Emphasis added.) [18]

In the Senate § 8c (5)(G) was amended, without objection, 79 Cong. Rec. 11655, to read:

> "(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, except as provided for milk only in subsection (d), the marketing in that area of any milk or product thereof produced in any production area in the United States." [19]

Section 8c (5)(G) emerged from conference in its present form. The conference report explained how the differences between the House and Senate versions were resolved (H. R. Rep. No. 1757, 74th Cong., 1st Sess. 21):

> ". . . The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the pro-

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[18] The "3-month period" provision here referred to is the present § 8c (5)(D) which authorizes the Secretary to set the surplus-use price as the price to be paid to any new producer who enters the pool. In the final version of the Act the introductory period was reduced to two months.

[19] "Subsection (d)" is § 8c (5)(D). See note 18, *supra*.

visions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc."

When the conference agreement came to the floor of the House, Representative Jones again explained what § 8c (5)(G), when taken together with § 8c (5)(D), meant (79 Cong. Rec. 13022):

"Mr. SNELL. . . . I do not understand exactly what this means, 'No marketing agreement or order applicable to milk and its products,' and so forth.

"Mr. JONES. That simply applies to fluid milk. You cannot make any limitation at all on the amount of butter or cheese or milk products that are shipped from any one area to another, *and the limitation that may be applied on milk is only such limitation as puts each area on an equality with the other areas after a certain period of about 2-1/2 months.*

. . . . . .

"Mr. SNELL. How does that change the situation from the present law?

"Mr. JONES. The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do not have the protection of this bill they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. Under the provisions of this bill if a price were fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to *pay the producer the same price that was being paid the producers within the area* and comply with

> all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price." (Emphasis added.)

This history discloses that rather than being confined, as Judge Learned Hand suggested in *Kass* v. *Brannan*, 196 F. 2d, at 800, to practices aimed at the exclusion of cheese and other milk products from eastern markets, § 8c (5)(G) was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products. Whenever there was an attempt to broaden the language of subsection (G) to encompass "limitations" as well as "prohibitions," those opposing it pointed only to the fact that "limit" might be read as including the type of price fixing covered by subsection (D)—*i. e.*, allowing new pool producers only manufacturing-use prices for a limited period—or other attempts to put outside milk on an equal footing with pool milk. Although the words of § 8c (5)(G), "in any manner limit," must be taken, in the context of their legislative history, as referring only to milk products, that history likewise makes it clear that as regards milk the word "prohibit" refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers of the kind effected by the subsidies called for by this "compensatory payment" provision.

V.

The Invalidity of the Present Compensatory Payment Provision.

In light of the legislative history of § 8c (5)(G) we conclude that the compensatory payment provision of the New York-New Jersey Milk Marketing Order must fall as inconsistent with the policy expressed by Congress in

that section.[20] Because it conflicts with § 8c (5)(G), the payment provision cannot be justified under the general terms of § 8c (7)(D), which prevents the inclusion of conditions that are inconsistent with express statutory provisions. Nor is the compensatory payment clause saved by the circumstance that in some instances it may also fortuitously operate to put the handlers of pool and nonpool milk on a competitive par. As has been pointed out (note 13, *supra*), there are other means available to the Secretary for achieving this result, while affording protection to pool producers, without imposing almost insuperable trade restrictions on the entry of nonpool milk into a marketing area.

The Government contends that the effect of § 8c (5)(G) may not be considered by this Court since that provision was not cited by the petitioners in the administrative proceeding in the Department of Agriculture. But even on the Government's premise that an unauthorized regulation should be upheld by this Court merely because the provision prohibiting it was not cited in the administrative proceeding in which it was attacked, this case presents no such instance. The administrative petition filed with the Department of Agriculture alleged that the effect of the compensatory payment clause amounted "to establishing tariffs or barriers interfering with the free flow of milk across state lines," an obvious reference to the prohibition of § 8c (5)(G).

In addition, the Government contends that the petitioners had the choice of joining the market-wide pool, in which case they would not have been subject to the compensatory payment provisions. Their election to stay

[20] While we need not reach the point, we would have difficulty in concluding, as did the Court of Appeals for the Second Circuit in *Kass* v. *Brannan, supra,* that the provisions of § 8c (5)(A) precluded, in themselves, the promulgation of the present compensatory payment provision.

out of the pool, it is argued, bars any attack on the consequences of their choice. However, such an "election" is surely illusory. The consequences of joining the pool would have been that petitioners would have been forced to pay the "blend price" to all their producers wherever located and account to the Producer Settlement Fund for all milk wherever sold. In these circumstances the election was not voluntary as in *Booth Fisheries* v. *Industrial Comm'n,* 271 U. S. 208, 211. It was coercive and, indeed, no election at all.

Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us. With respect to these petitioners, however, and with regard to the regulation here in issue, we conclude that the action of the Secretary of Agriculture exceeded the powers entrusted to him by Congress.

The Secretary of course remains free to protect, in any manner consistent with the provisions of the statute, the "blend price" in this or any other marketing area against economic consequences resulting from the introduction of outside milk. We do not now decide whether or not any new regulation directed to that end could be made to apply retrospectively, or whether, if it could be validly so applied, the presently impounded funds could be resorted to *pro tanto* in its effectuation. Cf. *United States* v. *Morgan,* 307 U. S. 183. "What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide." *Morgan* v. *United States,* 304 U. S. 1, 23, 26.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

I find it impossible to agree with the Court's holding or opinion. In 1936, in *United States* v. *Butler*,[1] this Court temporarily paralyzed the national farm recovery program by holding important parts of the Agricultural Adjustment Act of 1933 unconstitutional and by casting grave doubts upon the remainder of that Act which had been passed at the bottom of the Great Depression for the express purpose of alleviating the desperate economic plight of the American farmer. Following that decision Congress, in 1937, with unusual promptness adopted another national farm program reaffirming the broad and comprehensive powers it had previously given the Secretary of Agriculture to develop agricultural marketing plans for the purpose of raising the income of farmers.[2] The philosophy of this later Act was not competition as in the Sherman Act but governmental price fixing as in the original 1933 Agricultural Adjustment Act, the National Industrial Recovery Act, and a host of other contemporaneous Acts, all of which were designed to raise the income and purchasing power of workers and farmers. Today some 26 years after the *Butler* decision this Court

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[1] 297 U. S. 1.

[2] 50 Stat. 246, 7 U. S. C. § 601 *et seq.*

again projects itself across the path of the national farm program by reading Congress' 1937 re-enactment as designed to encourage competition rather than to help farmers by governmental price fixing, and on this basis strikes down a vital element of many of the milk marketing orders set up under the 1937 Act while raising clouds of confusion and uncertainty as to the validity of many others. Although the blow to the present farm program is not so devastating as the one inflicted on the original Act by the *Butler* decision, I think that in ultimate effect the harmful consequences of the two decisions will differ only in degree. It is my belief that the order of the Secretary which the Court strikes down was set up in faithful adherence to the Act's purpose to raise the prices that farmers receive for their products and that the Court's action will tend to have precisely the opposite effect of depressing those prices. I have no doubt but that the Court's decision will enable some handlers to reap greater profits but I regret to say that this is bound to be at the expense of the farmers themselves—for whose benefit the national program was primarily passed. Certainly this is true of the more than $700,000 which the Court's decision today will allow the two handlers here to be paid which of necessity must come out of the pockets of the dairy farmers where this milk was sold.

The basic features of the Act under which the Secretary promulgated the regulation which the Court today strikes down were first enacted in 1935 [3] when the dairy industry was near the bottom of its depression and dairy farmers in many parts of the country were not even receiving the actual cost of producing the milk they sold. These 1935 provisions were themselves amendments to the original 1933 Agricultural Adjustment Act, and were designed to spell out more clearly and to some extent add

[3] 49 Stat. 750.

to the broad powers which the original 1933 Act had given the Secretary to correct the "severe and increasing disparity between the prices of agricultural and other commodities" by raising "the purchasing power of farmers" and stabilizing the value of the "agricultural assets supporting the national credit structure." [4]

The causes of the low prices to dairy farmers which led Congress to grant these broad powers were, like the details of the operation of the milk business itself, incredibly complex. In the main, however, these low prices were widely attributed to a vicious and destructive competition among dairy farmers for fluid milk sales which brought farmers higher prices than did sales as surplus milk for manufacturing butter, cheese and other milk products.[5] In order to bring an end to this competition which was pushing farmers to the wall, the 1935 Act gave the Secretary specific power to set up regional marketing areas within which he could, for the Government, fix minimum prices handlers would have to pay to farmers for the various uses of milk, require that those minimum prices be paid to a pool for the area and distribute the proceeds of the pool so that each farmer selling milk through the pool would ultimately be paid at the same uniform rate or "blend price" regardless of the use to which his particular milk was put.[6] In the original 1935 Act the Secretary was directed to fix prices at "parity"—a level designed by Congress to insure that farmers generally would receive a higher price for their products than they could get in an open, competitive market.[7] The 1937 reenactment went beyond even this, however, and gave the Secretary power to fix prices above this parity level in order to

[4] 48 Stat. 31.

[5] See *Nebbia* v. *New York*, 291 U. S. 502, 515–518, 530; *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 548–550.

[6] 50 Stat. 246, as amended, 7 U. S. C. § 608c.

[7] 49 Stat. 750.

insure that dairy farmers in particular would receive a high enough price for their products.[8] In order to make sure that the Secretary had enough power to raise prices above the competitive level the Secretary was also authorized to issue orders "Incidental . . . and necessary to effectuate" the specific price-fixing and other powers given to him.[9] Thus it can be seen that the general scheme of the Act was to raise prices to farmers by governmental fixing of minimum prices for dairy products within specific regional areas, thereby abandoning to that extent the system of price fixing by competition.

In accordance with this general plan and under the authority of the Act, the Secretary has proceeded after full hearings within the various regions to set up a number of regional milk marketing pools, one of which is the New York-Northern New Jersey pool whose operation is jeopardized by the Court's decision today.[10] The Secretary has also chosen to leave a number of areas unregulated. Obviously in a system including both large unregulated areas and regulated regional pools in which prices may be fixed at different levels, there will be significant and complicated problems involved in milk sales and purchases that do not take place wholly within a single pool. Among the most serious of these prob-

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[8] 50 Stat. 247, 7 U. S. C. § 608c (18).

[9] 49 Stat. 757, 7 U. S. C. § 608c (7)(D).

[10] Congress specifically provided in § 8c (11)(C) of the Act that the Secretary's price-fixing powers were to be exercised on a regional basis rather than a national basis whenever practicable:

"All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas." 49 Stat. 759, 7 U. S. C. § 608c (11)(C). See also § 8c (11)(A). 49 Stat. 759, 7 U. S. C. § 608c (11)(A).

lems is that handlers from outside a pool can, if left unregulated, get the advantages of selling milk in that pool area without bearing any of the burdens that members of that pool have to bear. And as shown by the record in this case such sales can reduce the net price received by the farmers within the pool area. In an obvious effort to prevent any such harmful effects on the prices received by farmers in the New York-Northern New Jersey pool, the Secretary, properly I think, acting under his authority to issue orders "Incidental . . . and necessary to effectuate" his specific price-fixing powers, provided that nonpool handlers who sold fluid milk in that pool area at times when there was surplus fluid milk in the pool should make a payment to compensate pool farmers for the displacement of fluid sales they otherwise would have made, compensate for the reduction of the regional pool fund which this would cause and to compensate for the consequent diminution of the blend price that would be paid to pool farmers. It is this key regulatory feature which the Court strikes down as a "trade barrier" prohibited by § 8c (5)(G) of the Act because it limits the ability of outside handlers to sell milk within the pool area at a profit.

It is no doubt true that the Secretary's requirement that nonpool handlers make compensatory payments in order to sell fluid milk within the New York-Northern New Jersey pool area does limit to some extent the ability of handlers whose major business is outside the pool to dump their surplus milk into the pool at highly profitable fluid milk prices, and if this is a trade barrier the Secretary's regulation can properly be called a "trade barrier." But § 8c (5)(G) says nothing at all about prohibiting "trade barriers" or guaranteeing high profits to handlers, and if it had it would have been at cross purposes with the basic aim of the Act to have government rather than com-

petition fix the minimum prices that farmers in designated regional areas must be paid for their milk. It says only:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or *in any manner limit, in the case of the products of milk,* the marketing in that area of any milk or product thereof produced in any production area in the United States." [11]

This language contains no words or arrangement of words of any kind that would prohibit the Secretary from limiting the marketing of milk in any regional area where necessary to protect the prices fixed for that regional area. The Court, however, goes to great lengths to try to show on the basis of legislative history that Congress really meant the no-limitation clause to apply to milk as well as to milk products. In other words the Court wants to read the statute as if Congress had said "No order shall prohibit or limit the marketing in that area of any milk or product thereof." But Congress simply did not say that. And the whole legislative history persuades me that Congress knew exactly what it was saying and that, while it intended to forbid the Secretary from making blanket prohibitions against outside milk, it also meant to leave the Secretary free to establish whatever regulations were necessary to guarantee that farmers in a price-fixing region received the regional prices he was authorized to fix even though those regulations might limit sales by outside handlers by making them unprofitable.[12]

Outside the language of § 8c (5)(G) itself the clearest indication that this is the proper interpretation of the leg-

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[11] 49 Stat. 755, 7 U. S. C. § 608c (5)(G). (Emphasis supplied.)

[12] See *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 96; *Kass* v. *Brannan,* 196 F. 2d 791, 800 (L. Hand, J., dissenting).

islative history of the Act is that an amendment which would have made the no-limitation clause applicable to milk as well as milk products was defeated on the floor of the House and that an amendment to the same effect which passed the Senate was deleted in Conference.[13] The arguments of the Chairman of the House Committee on Agriculture, one of the principal architects of the program,

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[13] The amendment adopted by the Senate but rejected by the Conference is indicated in italics: "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit *or in any manner limit, except as provided for milk only in subsection (d)*, the marketing in that area of any milk or product thereof produced in any production area in the United States." 79 Cong. Rec. 11655. The wording of this amendment shows that the Court's attempted explanation of why "in any manner limit" was omitted from the final language of § 8c (5) (G) does not bear analysis. The Court's explanation is that someone might construe "limit" as prohibiting "the type of price fixing [limitation] covered by subsection (D)." But it seems very clear that the wording of the Senate amendment was expressly designed to prevent such a construction while at the same time making "in any manner limit" applicable to milk. Consequently it seems apparent that in rejecting the Senate amendment the Conference was not refusing to apply "in any manner limit" to milk because to do so would interfere with the operation of subsection (D), but was in fact omitting that language because, to be effective, price fixing itself necessarily required limitations on the selling of outside milk within the area. This is clearly shown by the Conference Report, H. R. Rep. No. 1757, 74th Cong., 1st Sess. 21:

"The Senate amendment extended this provision [§ 8c (5) (G)] so that no marketing agreement or order so applicable could limit in any manner the marketing in the marketing area of milk or its products produced anywhere except that certain limitations on the marketing of milk were specifically permitted. . . . The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products . . . [but] does not refer to milk, and *so does not negative the applicability to milk*, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk such as *the provisions on price fixing*, price adjustment, payments for milk, etc." (Emphasis supplied.)

against the amendment in the House show, almost conclusively, a general understanding that regional price fixing necessarily required sales from out of the region to be limited if the price fixing were to be successful:

> "Mr. JONES. Mr. Chairman, *the adoption of the amendment of the gentleman from Wisconsin would absolutely wreck the whole milk program. In order to get away from the terriffic conditions that have prevailed in the milk industry there is provided in the bill authority to fix a minimum price to producers. That, at least in a measure, would limit or tend to limit shipment,* and yet the gentleman, I am sure, does not want to interfere with the price to producers. Then it is a universal custom in the marketing of milk to classify milk. This, in a way, is a limitation.
>
> "I am perfectly willing to adopt the first amendment suggested [the present § 8c (5)(G)], because that simply treats all areas alike, for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area; *but if you said that no restrictions or limitations could be required, it would wreck the program, it would destroy every vestige of a program we have for milk.*" [14]

After the Senate amendment had been rejected by the Conference and while the Conference Report was being considered in the House of Representatives, a discussion took place on the floor between Representative Hope, a member of the House Committee on Agriculture and one of the conferees, and the Chairman of the Committee who was also a conferee. This discussion shows the same understanding that the Secretary was to be left free to

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[14] 79 Cong. Rec. 9572. (Emphasis supplied.)

impose whatever limitations were necessary to protect the regional prices he was authorized to fix:

> "Mr. JONES. But the original amendments did not permit any orders governing the price to the producers?
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> "Mr. HOPE. No; but otherwise the Secretary could make orders which would regulate the bringing in of milk from the outside into any particular milkshed, but under the amendments we are now considering the Secretary's power is limited. He cannot prohibit milk from coming in?
>
> "Mr. JONES. That is correct.
>
> "Mr. HOPE. *But he can prescribe some limitations?*
>
> "Mr. JONES. *Yes; and he cannot prohibit the products of milk being brought into any area.*
>
> "Mr. HOPE. *No; but he can prescribe limitations on the importation of fluid milk.*
>
> "Mr. SNELL. *Then, as far as fluid milk is concerned, it is protected in certain markets,* but, as far as the other products are concerned, they are not protected.
>
> "Mr. JONES. That is correct." [15]

These were the last comments made on the floor of the House concerning milk before the Conference Report was finally adopted.

In the light of this legislative history and the Act's language itself, I cannot possibly read § 8c (5)(G) or any other part of the Act to insure profitable operations to outside handlers who desire to dump surplus milk into a regional price-fixing area or to say that the Secretary lacks the power to protect by appropriate regulations the integrity of the regional prices which Congress authorized him to fix. I simply cannot believe that Congress intended to

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[15] 79 Cong. Rec. 13022. (Emphasis supplied.)

take away with one hand the high fixed price for milk which it gave with the other.

The net result of the Court's action is to leave the farmers in the New York-Northern New Jersey pool, and those in 22 other pools containing the provisions which the Court strikes down today,[16] completely defenseless against an onslaught of outside milk that is highly discriminatory because the outside milk bears none of the burdens of pool milk. I say completely defenseless despite the fact that the Court intimates that the Secretary might possibly devise some alternative compensatory payment plan that would satisfy the exacting standards which it lays down today. My first reason for saying this is that I do not see how any formula that the Secretary could devise under the Court's expanded interpretation of the word "prohibit" in § 8c (5)(G) would protect pool members from unfair competition by outside handlers who are by the Court's decision given the advantages but not required to bear the burdens of the pool.[17]

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[16] See note 9 of the Court's opinion. At least 18 other pools apply a compensatory payment provision like the one in this case for at least part of the year. See note 13 of the Court's opinion.

[17] Certainly neither of the formulas which the Court in its note 13 intimates might be proper would protect the farmers in the pool, for neither of these formulas even goes so far as to wipe out the discriminatory advantage that unregulated outside milk has over pool milk. In sustaining the Secretary's regulation in this case the Judicial Officer relied in part on the following reasons:

"[T]he marketwide pool existing under Order No. 27, as amended, carries the long-time and seasonal reserves of milk for numerous secondary markets in Pennsylvania and the Northeastern States. The New York-New Jersey market carries the surplus burden for outside handlers who distribute some milk in the marketing area. These handlers usually have a relatively high percentage of their milk in fluid milk utilization and this utilization is considerably higher than the average for the market regulated by Order No. 27. This higher utilization, of course, results in a competitive advantage in milk procurement to the outside handler as against the regulated handler and

Secondly, even if such a formula were possible I doubt that a single member of this Court has the technical knowledge about the complicated workings of the milk industry to formulate a sound substitute for the compensatory payment plan which the Court strikes down—a regulatory plan which represents more than a quarter century of daily practical experience in administering the congressional farm plan. Thirdly, in any event the Court's vague intimations that some compensatory payment plan might be valid are hardly sufficient to furnish the Secretary with any guidance at all as to what formula if any the Court would permit him to use to protect the farmers in this pool from the effects of being compelled to compete with outside "free riders."

I think that if the Court really does believe that the Secretary has any power at all to prevent pool farmers from being subjected to discriminatory competition from outside "free riders" it should state in clear and precise

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outside and regulated handlers draw on the same production area for supplies. Furthermore, the regulated handler has to equalize his utilization with other handlers and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than his individual utilization."

Thus, a compensatory payment, such as the Court suggests, based on the difference between the fluid price and the blend price obviously would do nothing at all to wipe out the advantage that the outside handler has because of his higher fluid-surplus ratio which is due, as shown above, to (1) the fact that the pool carries part of his area's surplus and (2) the fact that he does not have to equalize his own utilization as do pool handlers. Only a compensatory payment which gives the outside handler less for his surplus milk than the pool farmer gets will narrow the competitive advantage which outside milk has. A compensatory payment based on the difference between the fluid price and actual cost, the other alternative suggested by the Court, would obviously be even more subject to this same defect than the fluid-blend price compensatory payment. See also Hutt, Restrictions on the Free Movement of Fluid Milk Under Federal Milk Marketing Orders, 37 U. Det. L. J. 525, 573–576, particularly at note 220.

terms what those powers are and inform the Secretary how he can meet this Court's requirements. The Court should then remand this case to allow the Secretary to take the action which it will approve, permit him to determine the amount that he could properly under its standards have required these handlers to pay and direct that the District Court pay over that amount to the Secretary out of the funds now in its possession. This plan would at least offer the farmers in this pool some protection against having to pay out all of the more than $700,000 in compensatory payments which has already been collected from these handlers. Such a plan was followed in *United States* v. *Morgan*,[18] and there is every reason in equity and good conscience why it should be followed here. In that case the District Court enjoined an order of the Secretary but required the party challenging the order to pay into court sufficient funds to effect compliance with the order if it should ultimately be found valid. This Court found the order defective but nevertheless ordered the District Court not to return the fund, which then contained over a half million dollars. On the contrary, over strong dissents urging that the Secretary only had power to issue a new order for the future, this Court commanded that the fund be retained until the Secretary could make new findings and enter a new order so that the fund could be disposed of under a proper determination of the Secretary, stating that:

> "Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court

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[18] 307 U. S. 183. Cf. *Inland Steel Co.* v. *United States*, 306 U. S. 153.

> until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him." [19]

Following this decision the Secretary held new hearings, made new findings and entered a new order, according to which this Court in a later *United States* v. *Morgan* [20] ordered the more than one-half-million-dollar fund distributed.

Despite the fact that the Court purports not to pass either on the validity of requiring all handlers to bear the full burdens of pool membership or upon the ability of the Secretary to apply against these handlers any future scheme of regulation which meets the Court's standards for the period here in question,[21] it seems clear that in failing to follow the *Morgan* procedure the Court in effect rules against the Secretary on both these questions. This is because the Court's refusal to pass specifically on these questions leaves standing the District Court's holding that the Secretary cannot require these handlers to bear the full burdens of pool membership for the period during which the compensatory payments struck down here were made. The regulation under which the Secretary claims that these handlers are subject to the full burdens of pool membership is a part of the same section [22] as the one under which the handlers made the compensatory payments of which they com-

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[19] 307 U. S., at 198.

[20] 313 U. S. 409.

[21] The Court's citation of *Morgan* v. *United States*, 304 U. S. 1, 23, as purported justification for its avoidance of this issue is particularly appropriate, and I fear prophetic. For in large part due to this Court's avoidance of a similar issue in the *Morgan* case, that case wandered through the courts for almost eight years, including four trips to this Court.

[22] 7 CFR § 1002.29 (d).

plain. That section provides that all handlers like petitioners are pool handlers and required to bear all the burdens of pool membership unless they elect to be non-pool handlers and make compensatory payments. The Secretary's contention is that once the part of the regulation which provides for the compensatory payment is struck down, as the Court does here, the remainder of the regulation which requires all handlers to be pool handlers applies. By remanding this case to the District Court which has already ruled adversely on this claim the Court without so much as saying a single word on this point effectively prevents the Secretary from trying to protect pool farmers from free-riding outside milk by treating these handlers as pool members for the period here in dispute.

The full effect of the Court's failure to follow the *Morgan* procedure and decide whether the Secretary's provisions for full regulation of these handlers are valid, or just what the Secretary could do to protect the prices he has fixed, is in my opinion likely to be a wholly unjust and inequitable windfall of over $700,000 to the handlers, since it will ultimately have to come out of the pockets of the farmers who bear the burdens of this pool. How many more such windfalls to other handlers involving how many countless thousands of dollars in this and the other 22 similarly situated pools the Court's action will bring one can only guess.[23] One familiar with the Act and its history need not guess, however, about the fact that such a result would have been abhorrent to the Congress which passed this Act for the benefit of farmers. I would affirm the decision of the court below which upheld the Secretary.

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[23] A suit involving the provision of the Cleveland order similar to the one struck down here has already found its way into court. See *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, appeal pending.

CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, *v.* TRAVELERS INSURANCE CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 532. Argued April 23, 1962.—Decided June 4, 1962.*

1. Injuries sustained by employees working on new vessels under construction and afloat upon navigable waters are not excluded from the coverage of the Longshoremen's and Harbor Workers' Compensation Act by § 3 (a) thereof although recovery for such injuries may validly be had under a state workmen's compensation law. Pp. 115–131.

2. Acceptance by such an employee of payments under a state workmen's compensation law does not constitute an election of the remedy under the state law which precludes recovery under the Longshoremen's Act. Pp. 131–132.

293 F. 2d 51, 52, reversed.

Solicitor General Cox argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Orrick, Bruce J. Terris, Morton Hollander* and *David L. Rose.*

Louis V. Nelson argued the cause for Travelers Insurance Co. et al., respondents. With him on the briefs was *Ewell Strong.*

Charles Kohlmeyer, Jr. argued the cause and filed a brief for Avondale Shipyards, Inc., respondent.

Briefs of *amici curiae,* urging reversal, were filed by *Raymond H. Kierr* and *Samuel C. Gainsburgh* for Minus Aizen, and by *Herman Wright* for McGuyer's widow and children.

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*Together with *Donovan, Deputy Commissioner,* v. *Avondale Shipyards, Inc.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act provides that compensation shall be paid only for injuries occurring on navigable waters "and if recovery . . . through workmen's compensation proceedings may not validly be provided by State law." [1] In each of these cases the petitioner is a Deputy Commissioner who based an award of compensation under the Act on findings that the employee was engaged at the time of his injury in the work of completing the construction of a vessel afloat on navigable waters.[2]

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[1] The Act, 44 Stat. 1424, as amended, is comprised in 33 U. S. C. §§ 901–950. Section 3 (a), 33 U. S. C. § 903 (a), reads:

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

[2] In the *Calbeck* case the employee, Roger McGuyer, was a welder in the employ of the Levingston Shipbuilding Company which owns and operates a shipyard on the navigable Sabine River, between Orange, Texas, and Calcasieu Parish, Louisiana. McGuyer worked both on the repair of completed vessels and on vessels under construction. He was injured while working on an uncompleted drilling barge which had been launched and was floating on the Sabine River while its superstructure was under construction.

In the *Donovan* case the employee, Minus Aizen, was also a welder. His employer was Avondale Marine Ways, Inc., which operated two shipyards near New Orleans. Aizen had worked only on new construction although fellow employees worked both on new construc-

Before the Longshoremen's Act was passed, this Court had sustained the validity of a state workmen's compensation statute as applied to injuries suffered by an employee engaged in the completion of a launched vessel under construction on navigable waters, *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, but had made clear that state compensation statutes could not, constitutionally, be applied to injuries to employees engaged in repair work on completed vessels on navigable waters.[3] The court below interpreted § 3 (a) as adopting this distinction and so set aside both awards, thus holding that a shipyard worker's right to compensation under the Act, if his injury is incurred on a vessel, depends not only on whether the vessel is on navigable waters, but also on whether the vessel was under repair rather than under construction. *Avondale Shipyards, Inc.*, v. *Donovan*, 293 F. 2d 51; *Travelers Insurance Co.* v. *Calbeck*, 293 F. 2d 52. We granted certiorari because of the importance of the interpretation of § 3 (a) in the administration of the Act. 368 U. S. 946. We reverse the judgments of the Court of Appeals and affirm the judgments of the District Courts sustaining the awards.

The Court of Appeals' interpretation of § 3 (a) would, if correct, have the effect of excepting from the Act's coverage not only the injuries suffered by employees while engaged in ship construction but also any other injuries—even though incurred on navigable waters and so within

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tion and on repair work. He was injured while welding on an oil drilling barge which had been launched and was floating on the navigable waters of the Mississippi River while her construction was being completed.

[3] See *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479; *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449. See also *Baizley Iron Works* v. *Span*, 281 U. S. 222, 230–232.

the reach of Congress—for which a state law could, constitutionally, provide compensation. But the Court of Appeals' interpretation is incorrect. The history of the Act, and of § 3 (a) in particular, contravenes it; and our decisions construing § 3 (a) have rejected it. Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters [4] whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law.

The Longshoremen's Act was passed in 1927. The Congress which enacted it would have preferred to leave to state compensation laws the matter of injuries sustained by employees on navigable waters within state boundaries. However, in 1917 this Court had decided in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, that the New York Compensation Act could not, constitutionally, be applied to an injury sustained on a gangplank between a vessel and a wharf.[5] It was held that the matter was outside state cognizance and exclusively within federal maritime jurisdiction, since to hold otherwise would impair the harmony and uniformity which the constitutional grant to the Federal Government of the admiralty power was meant to assure. While the Court acknowledged

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[4] Our use of the term "employees" throughout this opinion excludes those special categories described in subsections (1) and (2) of § 3 (a), see note 1, *supra;* and assumes that they are employed by an "employer" as defined in § 2 (4), 33 U. S. C. § 902 (4), *i. e.,* "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

[5] The constitutionality of the New York statute in other respects was sustained at the same Term. *New York Central R. Co.* v. *White,* 243 U. S. 188. The validity of the Washington and Iowa statutes was also upheld. *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Hawkins* v. *Bleakly,* 243 U. S. 210.

that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation," 244 U. S., at 216, the opinion appeared to foreclose the application of a state compensation remedy to any maritime injury.

The *Jensen* decision deprived many thousands of employees of the benefits of workmen's compensation. Congress twice attempted to deal with the situation by legislation expressly allowing state compensation statutes to operate. Act of October 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634. But this Court struck down both statutes as unconstitutional delegations to the States of the legislative power of Congress, and as tending to defeat the purpose of the Constitution to achieve harmony and uniformity in the maritime law. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219.

Meanwhile the Court handed down a number of decisions which appeared to modify *Jensen* by permitting States to apply their statutes to some maritime injuries. But we must candidly acknowledge that the decisions between 1917 and 1926 produced no reliable determinant of valid state law coverage. In *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, decided in 1921, the Court upheld the jurisdiction of a United States District Court to entertain a libel in admiralty for damages for the death of a longshoreman under a state wrongful death statute. The Court reasoned that while the subject was maritime it was "local in character" and that application of the state statute "will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." 257 U. S., at 242.

Just a month later the Court decided *Grant Smith-Porter Ship Co.* v. *Rohde, supra,* where, as in the cases before us, a shipbuilder's employee was injured while at work on new construction afloat on navigable waters. He recovered a judgment under a libel in admiralty, although Oregon had a state workmen's compensation law which made the remedy thereunder exclusive of all other claims against the employer on account of the injury. This Court reversed that judgment, holding that the accident was among those "certain local matters regulation of which [by the States] would work no material prejudice to the general maritime law." 257 U. S., at 477.

No dependable definition of the area—described as "maritime but local," or "of local concern"—where state laws could apply ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of "local concern," depending upon its peculiar facts. In numerous situations state acts were considered inapplicable because they were thought to work material prejudice to the characteristic features of the general maritime law, particularly in cases of employees engaged in repair work.[6] On the other hand, awards under state compensation acts were sustained in situations wherein the effect on uniformity was often difficult to distinguish from those found to be outside the purview of state laws.[7]

Thus, the problem which confronted Congress in 1927 had two facets. One was that the failure of Congress'

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[6] See, *e. g., Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479; *Gonsalves* v. *Morse Dry Dock & Repair Co.,* 266 U. S. 171; *Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449.

[7] See, *e. g., State Commission* v. *Nordenholt Corp.,* 259 U. S. 263; *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59.

attempts to shelter the employees under state compensation laws rendered it certain that for many maritime injuries no compensation remedy was available. The other was that the course of judicial decision had created substantial working uncertainty in the administration of compensation. Congress turned to a uniform federal compensation law as an instrument for dealing with both facets. Indeed, the Court in *Dawson* had invited such consideration, saying: "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States." 264 U. S., at 227.

The proposal of a uniform federal compensation act had the unqualified support of both employers and employee representatives. Workmen's compensation had gained wide acceptance throughout the country and State after State was enacting it.[8] But hard battles were fought in committee and on the floor in both Houses of Congress over the form of the law. The bill introduced in the Senate, S. 3170, became the basis of the law.

There emerges from the complete legislative history[9] a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where *Jensen*

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[8] See 1 Larson, The Law of Workmen's Compensation, §§ 4.10–5.30.

[9] Hearings before the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess.; Hearings before the House Judiciary Committee on S. 3170, 69th Cong., 1st Sess.; S. Rep. No. 973, 69th Cong., 1st Sess.; H. R. Rep. No. 1767, 69th Cong., 2d Sess. See also H. R. Rep. No. 1190, 69th Cong., 1st Sess. (accompanying H. R. 12063); Hearings before the House Judiciary Committee on H. R. 9498, 69th Cong., 1st Sess.

might have seemed to preclude state compensation. The statute's framers adopted this scheme in the Act because they meant to assure the existence of a compensation remedy for every such injury,[10] without leav-

[10] See S. Rep. No. 973, 69th Cong., 1st Sess., at 16:

"The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States. There are in the neighborhood of 300,000 men so employed in the entire country.

"The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. *v.* Jensen, 244 U. S. 205; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149; Washington *v.* Dawson & Co., 264 U. S. 219.)

"It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

To like effect is H. R. Rep. No. 1190, 69th Cong., 1st Sess., at 1, 3:

"This bill provides compensation for employees injured . . . in certain maritime employments . . . . The principal wage earners provided for are longshoremen . . . . Next in importance are the ship repairmen—carpenters, painters, boiler makers, etc. Congressional action is necessary if these wage earners are to be given the benefits of workmen's compensation owing to the provisions of

ing employees at the mercy of the uncertainty, expense, and delay of fighting out in litigation whether their particular cases fell within or without state acts under the "local concern" doctrine.

The gravity of the problem of uncertainty was emphasized when § 3 of S. 3170 in its original form was under discussion at the Senate Hearings. That version of § 3 provided: "This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States, *except employment of local concern and of no direct relation to navigation and commerce;* but shall not apply to employment as master or member of the crew of a vessel." (Emphasis supplied.) The Chairman of the Senate Committee perceived that to create an exemption for "employment of local concern" threatened to perpetuate the very uncertainties of coverage that Congress wished to avoid.[11] The danger was

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the Constitution of the United States and the decisions of the Supreme Court thereunder. . . . The committee . . . recommends that this humanitarian legislation be speedily enacted into law so that this class of workers, practically the only class without the benefit of workmen's compensation, may be afforded this protection, which has come to be almost universally recognized as necessary in the interest of social justice between employer and employee."

H. R. Rep. No. 1767, 69th Cong., 2d Sess., at 20, makes clear that the House was desirous of legislation whereby Congress could

"discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union."

[11] The following colloquy occurred between the Chairman, Senator Cummins, and an employer spokesman who was testifying:

"The CHAIRMAN. That term [employment of local concern] was used in one of the decisions of the Supreme Court, probably, but, in its application, just what does it mean?

[*Footnote 11 continued on p. 123*]

underlined by objections on behalf of two large employer groups. They not only expressed concern about the practical problems created by the line between new construction and repair, Senate Hearings, at 92–93, but also about the broader implications of the wording: "This provision is indefinite. The exception of 'employment of local concern and of no direct relation to navigation and commerce' is vague and will be the subject of continual litigation. Innumerable claims will become legal questions requiring determination by the courts." Senate Hearings, at 95.

We are not privy to the Committee deliberations at which it was decided to drop the "local concern" language from § 3 and substitute the language now in the statute. We think it a reasonable inference that the Committee concluded that the exemption for "employment of local

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"Mr. BROWN. Unless there is something in connection with admiralty law which qualifies it, I should say it is a very vague thing, and we can not understand what it means. The phrase 'of no direct relation to navigation and commerce' is another questionable proposition, whether the coverage of this bill might not apply to a man on the docks. Some of my friends seem to think that it would not apply to the man on the docks, that the State laws now apply, and it was said in the same decision [the witness referred to *Rohde, supra,* but the quoted language is found in *Nordenholt, supra,* note 7, at 276]:

"There is no pertinent Federal statute and application of a local law will not work material prejudice to any characteristic feature of the maritime law.

. . . . . .

"The CHAIRMAN. We certainly can find some language that will describe these people that we intend to protect, but I am not sure whether this is the most accurate language that can be found.

"Mr. BROWN. I think that is true. I think that you could not only find language that would prescribe the coverage accurately, but I think that language could be devised that would be eminently satisfactory to everybody in [an] act that would incorporate the purposes which are, perhaps, behind this." Senate Hearings, at 57.

concern" would defeat the objective of avoiding the uncertainty created by *Jensen* and its progeny.

The action of the House Committee, when S. 3170 as revised in the Senate came before it, discloses similar preoccupations. The House Committee rewrote § 3 to omit both the original "local concern" language and the Senate substitute.[12] A parliamentary obstacle on an unrelated issue led to the House Committee's finally accepting the Senate version.[13]

In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3 (a) should, then, be construed to achieve these purposes. Plainly, the Court of Appeals' interpretation, fixing the boundaries of federal coverage where the outer limits of state competence had been left by the pre-1927 constitutional decisions, does not achieve them.

In the first place, the contours of the "local concern" concept were and have remained necessarily vague and

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[12] Section 3 as redrafted by the House Committee, H. R. Rep. No. 1767, 69th Cong., 2d Sess., at 2, was as follows:

"SEC. 3. This act shall apply to any maritime employment performed—

"(a) Upon the navigable waters of the United States, including any dry dock; or

"(b) As master or member of a crew of a barge, lighter, tug, dredge, vessel, or other ocean, lake, river, canal, harbor, or floating craft owned by a citizen of the United States."

[13] The House Committee could not obtain a rule from the House Rules Committee until it amended the bill to exclude seamen from coverage. 68 Cong. Rec. 5410, 5412. Rather than rewrite § 3 again the Committee adopted the Senate version. See *id.*, 5403–5404, 5410, 5412, explaining that the effect was to exclude seamen from coverage.

uncertain. There has never been any method of staking them out except litigation in particular cases.

In the second place, to conclude that federal coverage extends to the limits of navigable waters, except in those cases where a state compensation remedy "may" constitutionally be provided, would mean that, contrary to the congressional purpose, some injuries to employees on navigable waters might not be compensable under any statute. A vacuum would exist as to any injury which, although occurring within the constitutional domain of "local concern," was in fact not covered by any state statute. A restriction of federal coverage short of the limits of the maritime jurisdiction could have avoided defeating the objective of assuring a compensation remedy for every injury on navigable waters only if Congress had provided that federal compensation would reach any case not actually covered by a state statute. But in order to have accomplished this result, the statute would have had to withdraw federal coverage, not wherever a state compensation remedy "may be" validly provided, but only wherever a state compensation remedy "is" validly provided. Even if a court could properly read "may be" as meaning "is," such a reading would make federal coverage in the "local concern" area depend on whether or not a state legislature had taken certain action—an intention plainly not to be imputed to a Congress whose recent efforts to leave the matter entirely to the States had twice been struck down as unconstitutional delegations of congressional power.

Finally, there would have been no imaginable purpose in carving the area of "local concern" out of the federal coverage except to leave the greatest possible number of cases exclusively to the States. The price of such an objective would have included the adoption of whatever seemingly anomalous distinctions the courts might have

developed in articulating the contours of "local concern," as well as the risk of a total failure of compensation in cases within the "local concern" realm for which no state compensation had been provided. And in any event, a congressional purpose to leave the maximum possible business exclusively to the States would negate the Court of Appeals' reading of the line of demarcation as a static one fixed at pre-1927 constitutional decisions. Such a purpose would require, rather, that federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters. But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation. We cannot conclude that Congress imposed such a burden on the administration of compensation by thus perpetuating the confusion generated by *Jensen*. To dispel that confusion was one of the chief purposes of the Longshoremen's Act.

We conclude that Congress used the phrase "if recovery . . . may not validly be provided by State law" in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which *Jensen, Knickerbocker* and *Dawson* had rendered questionable the availability of a state compensation remedy.[14] Congress brought under the coverage of the

[14] The Committee reports, note 10, *supra*, make no reference to the "local concern" doctrine or the cases applying it. They explain

Act all such injuries whether or not a particular one was also within the constitutional reach of a state workmen's compensation law.[15]

Our previous decisions under the Act are entirely consistent with our conclusion. In *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, an employee of a seller of small boats, maritime supplies and outboard motors, hired primarily as a janitor and porter, was drowned when a boat in which he was riding capsized on the James River off Richmond, Virginia. The boat belonged to a customer of his employer and he and a fellow employee were testing one of the employer's outboard motors for which the boatowner was a prospective purchaser. The Court of Appeals for the Fourth Circuit had held that the employee's work was "so local in character" that Virginia could validly have included it under a state workmen's compensation act, and so had set aside an award to the employee's dependents under the Longshoremen's Act. This Court reversed. We noted that "it is not doubted that Congress could constitutionally have provided for recovery under a federal statute in this kind of situation. The question is whether Congress has so provided in this

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the problem in terms of the limitations on the availability of state remedies imposed by the Court's decisions in *Jensen*, *Knickerbocker*, and *Dawson*.

[15] We attach no significance to Opinion No. 7, September 2, 1927, of the Employees' Compensation Commission (now the Bureau of Employees' Compensation) stating that the Commission "will take no action under the longshoremen's act against an employer engaged only in the construction of vessels who does not comply with the act, nor against any employer engaged in the construction and repair of vessels who secures payment of compensation to employees while employed on repair work on a vessel in a dry dock or on marine ways." The Department was not foreclosed in the instant cases from changing an interpretation of the statute which was clear error. *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180.

statute" in the light of § 3 (a). 314 U. S., at 248. The Court held that § 3 (a) did not exclude coverage under the Act, saying: "There can be no doubt that the purpose of the Act was to provide for federal compensation in the area which the specific decisions referred to [in the Senate Report—*Jensen, Knickerbocker,* and *Dawson*—] placed beyond the reach of the states. The proviso permitting recovery only where compensation 'may not validly be provided by State law' cannot be read in a manner that would defeat this purpose." 314 U. S., at 249–250. We thus held that whatever may be § 3 (a)'s "subtraction from the scope of the Act," *id.*, at 249, the Act's adoption of the *Jensen* line between admiralty and state jurisdiction as the limit of federal coverage included no exception for matters of "local concern."

In *Davis* v. *Department of Labor,* 317 U. S. 249, a structural steel worker engaged in dismantling a bridge across a navigable river was cutting and stowing dismantled steel in a barge when he fell into the river from the barge and was drowned. His dependents sought compensation under the state act and this Court held that it could be applied. The result was not predicated on the ground that the employment was "maritime but local," and so outside the coverage of the Longshoremen's Act. Rather the Court viewed the case as in a "twilight zone" where the applicability of state law was "extremely difficult" to determine, and resolved the doubt, of course, in favor of the constitutionality of the application of state law. At the same time, the Court indicated that compensation might also have been sought under the Longshoremen's Act and that an award under that Act in the very same circumstances would have been supportable, pointing out that the Act adopts "the *Jensen* line of demarcation." 317 U. S., at 256. The conclusion that the Longshoremen's Act might have applied without regard

to whether the situation might be "maritime but local" plainly implies a rejection of any reading of § 3 (a) to exclude coverage in such situation.

The issue in *Avondale Marine Ways, Inc.*, v. *Henderson*, 346 U. S. 366, was whether compensation was available under the Longshoremen's Act for the death of an employee killed while engaged in the repair of a vessel which was then physically located on land, but on a marine railway. Since a marine railway was considered to be a "dry dock," the injury satisfied § 3 (a)'s requirement that it occur "upon . . . navigable waters," defined in § 3 as "including any dry dock." At the same time, since the injury did, in a physical sense, occur on land, there is little doubt that a state compensation act could validly have been applied to it. See *State Commission* v. *Nordenholt Corp.*, 259 U. S. 263. Nevertheless, this Court affirmed an award of compensation under the Federal Act in a *per curiam* opinion.

The legislative history and our decisions had been read consistently with the views expressed herein by the Court of Appeals for the Fifth Circuit before the decisions in the present cases. Judge Hutcheson said for the court in *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 483–484:

> "Before the Parker case was decided . . . this court, in Continental Casualty Co. v. Lawson, 5 Cir., 64 F. 2d 802, 804, announced the view that the federal compensation laws should be liberally construed to cover every case where the injury occurred on navigable waters and where within the rule of [*Jensen*] . . . the action would have been in admiralty. In that case we said:
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> " 'The question whether jurisdiction over a maritime tort could be asserted under the compensation

laws of the states, or existed exclusively in admiralty, was an important one when the decisions were rendered in the Rohde . . . and other similar cases . . . but since the passage of this act (the Federal Workmen's Compensation Act) the importance of that question has largely disappeared. . . . The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject-matter. . . .'

"The Parker case, supra, substantially adopts this view . . . . As the Parker case pointed out, it is not at all necessary now to redetermine the correctness vel non of the Jensen case or of any of [its] brood . . . . It is sufficient to say that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery . . . may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. . . . In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the 'local concern' doctrine to save to employees

> injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. . . . This is what we held in the Lawson case, what the Supreme Court held in the Parker case, supra. . . ."

We turn finally to a question raised only in *Donovan* v. *Avondale Shipyards.* The employer contends that the employee accepted benefits under the Louisiana State Compensation Act and that this constitutes an election of remedies which bars prosecution of his claim under the Longshoremen's Act. Compensation payments may be made under the Louisiana Compensation Act without a prior administrative proceeding. Before the federal claim was filed Avondale made payments to the employee for some two years and three months at the maximum rate provided by the Louisiana statute. The employee accepted the checks which bore a notation on their face that they were payments of compensation under the state act. In addition Avondale advanced a substantial sum to the employee to be credited against future compensation payments. Avondale also paid medical expenses for the employee's account in excess of the maximum liability imposed by the Louisiana statute. In the compensation order entered by Deputy Commissioner Donovan under the Longshoremen's Act the full amount of all payments made by the employer was credited against the award, and no impermissible double recovery is possible. We hold that the acceptance of the payments does not constitute an election of the remedy under state law precluding recovery under the Longshoremen's Act. Nothing in the statute requires a contrary result. And we agree that the circumstances do not support a finding of a binding election to look solely to the state law for recovery. *Massachusetts Bonding & Insurance Co.* v. *Lawson,* 149

F. 2d 853; *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968; *Western Boat Building Co.* v. *O'Leary*, 198 F. 2d 409.[16]

The judgments of the Court of Appeals are reversed and the judgments of the District Courts are affirmed.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, dissenting.

In the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950, Congress carefully provided for the recovery of benefits only "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." 33 U. S. C. § 903 (a). Now, thirty-five years later, the Court concludes that Congress did not really mean what it said. I cannot join in this exercise in judicial legerdemain. I think the statute still means what it says, and what it has always been thought to mean—namely, that there can be no recovery under the Act in cases where the State may constitutionally confer a workmen's compensation remedy. While the result reached today may be a desirable one, it is simply not what the law provides.

I seriously doubt whether statutory language as clear as that in 33 U. S. C. § 903 (a) could ever be ignored in the name of effectuating the supposed "Congressional desire." Be that as it may, this particular statutory lan-

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[16] Section 5 of the Longshoremen's Act, 33 U. S. C. § 905, which makes liability under the Act "exclusive . . . of all other liability . . . to the employee, his legal representative . . . and anyone otherwise entitled to recover damages . . . at law or in admiralty . . ." is not involved in this case.

guage does in fact reflect the purpose of Congress, which was only to provide compensation for those whom this Court's decisions had barred from the benefits of state workmen's compensation laws. And at the time of the passage of this federal law the Court had squarely held, as Congress well knew, that state workmen's compensation remedies *were* constitutionally available to workers who, as in the present cases, were engaged in new ship construction on navigable waters.

The Longshoremen's and Harbor Workers' Compensation Act was the culmination of a series of events beginning with this Court's decision in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, which held that the New York Workmen's Compensation Act could not constitutionally be applied to a stevedore unloading a vessel on navigable waters, because to do so would impair the uniformity of the general maritime law. Within five months after the *Jensen* decision Congress passed legislation which attempted to give injured maritime employees "the rights and remedies under the workmen's compensation law of any State." 40 Stat. 395. This legislation was declared unconstitutional as an invalid attempt to delegate federal power to the States. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149. A second statute, 42 Stat. 634, similar in approach to the first, was declared invalid in *Washington* v. *Dawson & Co.,* 264 U. S. 219.

Meanwhile, the Court was backing away somewhat from *Jensen* by recognizing that where the general employment and particular activities connected with an injury or death were local in character, though maritime in nature, state law could provide redress without disturbing the uniformity of the general maritime law. The maritime but local doctrine, first applied in connection with a state wrongful death statute, *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, provided the basis for holding that a state compensation act could be applied to a worker

engaged in the construction of a new vessel which, while uncompleted, was afloat on navigable waters. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469.[1]

Against this background Congress made its third and ultimately successful attempt to provide compensation for maritime employees deprived by the *Jensen* rule of state compensation remedies. Seizing upon a suggestion made by the Court in *Washington* v. *Dawson & Co., supra*, Congress turned its attention in the direction of a uniform federal compensation act. The Longshoremen's and Harbor Workers' Compensation Act was the result. In the previous two attempts to circumvent *Jensen* Congress had indicated its belief that the compensation remedy could best be supplied by the States. It is obvious that in the new Act Congress did not depart from this basic approach, either by making federal law applicable where state law could apply, or by giving the injured employee a choice of remedies. Congress had simply been informed by decisions of this Court that a compensation remedy could be provided for certain maritime injuries only through a uniform federal law, and the federal legislation was enacted only to fill the gap created by those decisions.

The legislative materials connected with the Act fully support this conclusion. It was repeatedly emphasized that the purpose of the Act was to provide a compensation remedy for those who could not obtain such relief under state law. "If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortu-

[1] During this same period the Court consistently held that the principles of *Jensen* prohibited the application of state compensation laws to workers engaged in the repair of existing vessels. *Robins Dry Dock & Repair Co.* v. *Dahl*, 266 U. S. 449; *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171; *Great Lakes Dredge & Dock Co.* v. *Kierejewski*, 261 U. S. 479.

nately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation." S. Rep. No. 973, 69th Cong., 1st Sess., at 16. "The committee . . . recommends that this humanitarian legislation be speedily enacted into law so that this class of workers, practically the only class without the benefit of workmen's compensation, may be afforded this protection . . . ." H. R. Rep. No. 1190, 69th Cong., 1st Sess., at 3. The chairman of the subcommittee conducting hearings on the bill categorically stated that "we are proceeding on the theory that these people can not be compensated under the New York compensation law or any other compensation law." Hearings before a Subcommittee of the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess., at 84. Similar statements were made by those who spoke during the committee hearings on the proposed legislation.[2] Several witnesses pointed out that the statute applied to but two categories of workers, longshoremen and those involved in ship repair,[3] the classes of employees denied relief under state compensation acts by the *Jensen* case and the decisions which followed it.[4]

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[2] Hearings before the House Judiciary Committee on H. R. 9498, 69th Cong., 1st Sess., at 39, 118; Hearings before a Subcommittee of the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess., at 22, 25–27, 31, 38, 85.

[3] Hearings before the House Judiciary Committee on S. 3170, 69th Cong., 1st Sess., at 141; Hearings before the House Judiciary Committee on H. R. 9498, 69th Cong., 1st Sess., at 44, 119; Hearings before a Subcommittee of the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess., at 80.

[4] The Court places heavy reliance on the deletion of the so-called "local concern" language from the original bill, pointing out that this language had been objected to as vague and uncertain. But it is apparent that the objections went to the possibility that the language

The meaning of 33 U. S. C. § 903 (a) can hardly be deemed a question of first impression. In the thirty-five years since its enactment this provision has been before the Court many times. The Court has consistently said that the Act does not apply to injuries on navigable waters where a State can constitutionally provide a compensation remedy. All the commentators have agreed.[5] And the administrators of the Act have so held, specifically with respect to new ship construction.[6]

In order to avoid the harsh results which the uncertainties of this statutory provision could sometimes produce, the Court in *Davis* v. *Department of Labor,* 317 U. S. 249, developed the theory of the twilight zone. There we reversed a decision of the Washington Supreme Court which had held that a State could not constitutionally make a compensation award to the widow of a workman drowned in a navigable river while dismantling a drawbridge. Relying on the language of § 903 (a) the Court pointed out that "Congress made clear its purpose to permit state compensation protection whenever possible . . . ." *Id.,* at 252–253. The Court went on to note that harbor workers and longshoremen were clearly protected by the Federal Act but that "employees such as decedent

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"except employment of local concern and of no direct relation to navigation and commerce" might not accurately define the line beyond which state law could be applied—a difficulty which was easily removed by making the statute inapplicable where a remedy could "validly be provided by State law."

[5] See Gilmore and Black, Admiralty, 346; Robinson, Admiralty, 110; Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637, 638–639; Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L. J. 472, 500; Comment, 67 Yale L. J. 1205, 1210–1211.

[6] See Opinion No. 7, September 2, 1927, of the Employees' Compensation Commission, discussed in n. 15 of the Court's opinion, *ante,* p. 127. This ruling was followed until 1959, a span of thirty-two years.

here, occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation." It was noted that both the Federal Act and the state compensation statute "show clearly that neither was intended to encroach on the field occupied by the other." *Id.*, at 255. Since this "jurisdictional dilemma" made it difficult for an injured worker to determine on which side of the line his particular case fell, the result in some cases had been that he obtained no compensation at all. In this "twilight zone" where the facts of a given case might place an injured worker on either side of the line, the Court held that it would give great weight to the administrative findings in cases brought under the Federal Act, and to the presumption of constitutionality in cases arising under state statutes. Because of this presumption of constitutionality the claimant in *Davis* was allowed her state remedy.[7]

Whatever else may be said of the *Davis* decision, it thus clearly rested on a construction of the statute precisely opposite to that adopted by the Court today. Indeed, if today's decision is correct, then there was no reason for the "twilight zone" doctrine worked out with such travail in *Davis*. For the Court now holds that the problem which led to the *Davis* decision never really existed. Yet as recently as 1959 the Court began a *per curiam* opinion with this topic sentence: "By its terms, the Longshoremen's and Harbor Workers' Compensation Act does not apply 'if recovery for the disability or death through workmen's compensation proceedings *may . . . validly be provided by State law.*'" *Hahn* v. *Ross Island*

[7] To achieve the result reached in *Davis* after today's decision would require the Court to ignore still another provision of the Federal Act—§ 905—which makes federal compensation the exclusive remedy when the Federal Act is clearly applicable.

Sand & Gravel Co., 358 U. S. 272. Today the Court simply removes these "terms" from the Act.[8]

In my view the decision of the Court of Appeals in these cases was correct. For almost forty years it has been unequivocally recognized that for those employed on new ship construction recovery for disability or death through workmen's compensation may validly be provided by state law. *Grant Smith-Porter Ship Co.* v. *Rohde, supra.* In one of the cases before us the claimant has actually been paid benefits under the Louisiana Compensation Act. In the other a claim under the Texas Act is pending and would clearly be allowed. See *Travelers Ins. Co.* v. *Gonzalez*, 351 S. W. 2d 374. These cases, therefore, were not by any stretch of the imagination within the twilight zone. The Federal Act is thus by its terms inapplicable.

I would affirm.

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[8] The Court's opinion places heavy reliance on *Parker* v. *Motor Boat Sales*, 314 U. S. 244. I cannot understand why. For in *Parker* the Court recognized that the proviso in § 903 (a) was "a subtraction from the scope of the Act." *Id.*, at 249. The Court today holds to the contrary. Moreover, any possible doubt as to the basis of the *Parker* decision was resolved in *Davis*, where the Court explained *Parker* in terms of the twilight-zone rule. 317 U. S., at 257.

LANZA *v.* NEW YORK.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 236. Argued April 2, 1962.—Decided June 4, 1962.

Petitioner was convicted in a state court of violating a state statute by willfully refusing to answer pertinent questions of a duly constituted legislative committee conducting an authorized legislative investigation, after he had been given immunity from prosecution. In this Court, he contended that his conviction violated the Due Process Clause of the Fourteenth Amendment because a conversation which he had with his brother in a public jail, where the latter was confined, was intercepted without their knowledge by state officials through an electronic listening device and a transcript of the conversation was used by the legislative committee in interrogating petitioner. The State's highest court certified that it had passed upon this claim and held that petitioner's constitutional rights were not violated. However, the record showed that at least two of the questions which petitioner was convicted of refusing to answer were not related in any way to the intercepted conversation, and refusal to answer either of these questions was sufficient to support the judgment. *Held:* The constitutional claim asserted by petitioner is not tendered by the record in this case, and the judgment is affirmed. Pp. 139–147.

9 N. Y. 2d 895, 175 N. E. 2d 833, affirmed.

Leo Pfeffer and *Jacob D. Fuchsberg* argued the cause and filed briefs for petitioner.

H. Richard Uviller argued the cause for respondent. With him on the briefs was *Frank S. Hogan.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On February 13, 1957, the petitioner paid a visit to his brother, who was then confined in a New York jail. The two conversed in a room at the jail set aside for such visits. Six days later the petitioner's brother was released from custody by order of one member of the State Parole

Commission, under rather unusual circumstances.[1] This prompted a committee of the New York Legislature to hold an investigation of possible corruption in the state parole system.[2]

During the course of the committee's investigation, the petitioner was called to testify. He appeared, accompanied by counsel. After granting the petitioner immunity from prosecution, as permitted by state law,[3] the committee directed him to answer several questions. For refusing to answer these questions the petitioner was indicted, tried and convicted under a provision of the criminal law of New York.[4] His conviction was affirmed on review by the New York courts.[5] We granted certio-

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[1] Four parole officers had concurred in a report finding that the petitioner's brother was "not a fit subject for restoration to parole." This report had been endorsed by three superiors in the Division of Parole. Shortly after receiving these recommendations a member of the Commission ordered the petitioner's brother released.

[2] The committee was the Joint Legislative Committee on Government Operations, created by the New York Legislature in 1955. This committee was endowed with "full power and authority to investigate, inquire into and examine the management and affairs of any department, board, bureau, commission . . . of the state, and all questions in relation thereto . . . ." The committee was specifically authorized to investigate "the administration of state and local laws and the detection and prevention of unsound, improper or corrupt practices in connection therewith."

[3] New York Penal Law §§ 381, 584, 2447.

[4] New York Penal Law § 1330: "A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

[5] The Appellate Division modified the judgment by directing that the terms imposed on the several counts of the indictment be served concurrently. 10 App. Div. 2d 315, 199 N. Y. S. 2d 598. The New York Court of Appeals modified the judgment further, holding that

rari, 368 U. S. 918, to consider the petitioner's claim that he could not constitutionally be punished for refusing to answer the questions put to him by the state legislative committee, because the conversation he had had with his brother in jail had been electronically intercepted and recorded by officials of the State, and a transcript of that conversation had furnished the basis of the committee's questions. For the reasons which follow, we hold that this constitutional claim is not valid, and we accordingly affirm the judgment before us.

The record does not make clear the precise circumstances under which the conversation in the jail between the petitioner and his brother was overheard and transcribed. The State concedes, however, that an electronic device was installed in the room at the Westchester County Jail where the two conversed on February 13, 1957, that without their knowledge their conversation was thereby overheard and transcribed by jail officials, and that a transcript of the conversation was in the hands of the legislative committee when the petitioner was summoned to testify.

The petitioner has not questioned the power of the state legislative committee to conduct an investigation into whether the state parole system was being administered honestly and evenhandedly, nor has he questioned the good faith or propriety of the particular investigation which gave rise to the present case. His argument is simply that the interception of the jail conversation was a violation of those principles of the Fourth Amendment which have found recognition in the Due Process Clause of the Fourteenth, that it was accordingly impermissible for the state legislative committee to make use of the transcript of that conversation in interrogating him, and

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the petitioner had committed but a single crime in refusing to answer the various questions put to him by the committee. 9 N. Y. 2d 895, 216 N. Y. S. 2d 706, 175 N. E. 2d 833.

that New York therefore denied him due process of law by convicting him for refusing to answer the committee's questions.[6]

The Fourth Amendment specifically insures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," by federal officers. We may take it as settled that the Fourteenth Amendment gives to the people like protection against the conduct of the officials of any State. *Mapp* v. *Ohio,* 367 U. S. 643; *Elkins* v. *United States,* 364 U. S. 206; *Wolf* v. *Colorado,* 338 U. S. 25.

The petitioner's argument thus necessarily begins with two assumptions: that the visitors' room of a public jail is a constitutionally protected area, and that surreptitious electronic eavesdropping under certain circumstances may amount to an unreasonable search or seizure. As to the second there can be no doubt. This Court through the years has not taken a literal or mechanical approach to the question of what may constitute a search or seizure.[7] And as recently as last Term we specifically held that electronic eavesdropping by federal officers, accomplished by physical intrusion into the wall of a house, violated the

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[6] The New York Court of Appeals made clear that it had passed upon this federal constitutional claim, and that its judgment was not based upon an independent state ground. Its amended remittitur was as follows:

"Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant argued that the imposition of penal sanctions for his refusal to answer certain questions deprived him of liberty without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that defendant's constitutional rights were not violated."

[7] *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Zap* v. *United States,* 328 U. S. 624; cf. *Irvine* v. *California,* 347 U. S. 128, 132; see also *Nueslein* v. *District of Columbia,* 73 App. D. C. 85, 115 F. 2d 690; *McGinnis* v. *United States,* 227 F. 2d 598.

Fourth Amendment rights of the occupants. *Silverman* v. *United States,* 365 U. S. 505.

But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area,[8] and so may be a store.[9] A hotel room, in the eyes of the Fourth Amendment, may become a person's "house," [10] and so, of course, may an apartment.[11] An automobile may not be unreasonably searched.[12] Neither may an occupied taxicab.[13] Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.[14] Though it may be assumed that even

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[8] *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298.

[9] *Amos* v. *United States,* 255 U. S. 313; *Davis* v. *United States,* 328 U. S. 582.

[10] *Lustig* v. *United States,* 338 U. S. 74; *United States* v. *Jeffers,* 342 U. S. 48.

[11] *Jones* v. *United States,* 362 U. S. 257.

[12] *Gambino* v. *United States,* 275 U. S. 310; *Carroll* v. *United States,* 267 U. S. 132; *Brinegar* v. *United States,* 338 U. S. 160; *Henry* v. *United States,* 361 U. S. 98.

[13] *Rios* v. *United States,* 364 U. S. 253.

[14] N. Y. Correction Law § 500-c provides, in part: "Convicts under sentence shall not be allowed to converse with any other person, except in the presence of a keeper."

The N. Y. State Commission of Correction, Regulations for Management of County Jails (Revised 1953 ed.), provide, in part:

"All parts of the jail should be frequently searched for contraband.

. . . . .

[*Footnote 14 continued on p. 144*]

in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection,[15] there is no claimed violation of any such special relationship here.

But even if we accept the premise that the room at the jail where the petitioner and his brother conversed was an area immunized by the Constitution from unreasonable search and seizure, and even though we put to one side questions as to the petitioner's standing to complain,[16]

"A thorough search should be made of all packages to prevent forbidden articles being smuggled into the jail. The number of articles permitted to be taken into the jail should be kept to a minimum. Saws have been secreted in bananas, in the soles of shoes, under the peaks of caps, and drugs may be secreted in cap visors, under postage stamps on letters, in cigars and various other ways. Constant vigilance is necessary if your jail is to be kept safe.

. . . . .

"Cells should be systematically searched for materials which would serve as a weapon or medium of self-destruction or escape. Razor blades are small and easily concealed.

. . . . .

"The law requires that visitors be carefully supervised to prevent passing in of weapons, tools, drugs, liquor and other contraband.

. . . . .

"In jails where a visitors' booth is provided, the safe-keeping of prisoners, especially those held for serious crimes, will be best insured if the booths are used for visits. Where there are no booths, and where prisoners are permitted to receive visitors in the corridors or jailer's office, visits should be closely supervised. Experience has shown that laxity in supervising visitors and searching packages has resulted in escapes, assaults on officers and serious breaches of discipline."

[15] Cf. *Lanza* v. *N. Y. S. Joint Legis. Comm.*, 3 N. Y. 2d 92, 164 N. Y. S. 2d 9, 143 N. E. 2d 772, affirming 3 App. Div. 2d 531, 162 N. Y. S. 2d 467; *Matter of Reuter*, 4 App. Div. 2d 252, 164 N. Y. S. 2d 534; see *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 191 F. 2d 749.

[16] See *Jones* v. *United States*, 362 U. S. 257.

the petitioner's argument would still carry far beyond any decision which this Court has yet rendered. The case before us bears no resemblance to such cases as *Leyra* v. *Denno,* 347 U. S. 556, where a State attempted to use as evidence in a criminal trial a confession which had been elicited by trickery from the defendant while he was in jail. See also *Spano* v. *New York,* 360 U. S. 315. We do not have here the introduction into a state criminal trial of evidence which is claimed to have been unconstitutionally seized, as in *Mapp* v. *Ohio,* 367 U. S. 643. See *Rochin* v. *California,* 342 U. S. 165. Nor is this a case where it is claimed that the evidence actually offered at a trial was procured through knowledge gained from what had been unlawfully obtained—the "fruit of the poisonous tree." Cf. *Nardone* v. *United States,* 308 U. S. 338.

Here no such evidence was ever introduced in a prosecution against the petitioner. Rather, the petitioner was convicted for willfully refusing to answer the pertinent questions of a duly constituted legislative committee in the conduct of an authorized legislative investigation, after having been given immunity from prosecution. To hold that the petitioner could not constitutionally be convicted for refusing to answer such questions simply because they related to a conversation which had been unlawfully overheard by other state officials would thus be a completely unprecedented step.

The ultimate disposition of this case, however, does not demand consideration of whether such a step might ever be constitutionally required. For even if all the other doubtful issues should be resolved in the petitioner's favor, the record conclusively shows that at least two of the questions which the committee asked him were not related in any way to the intercepted conversation. The petitioner was asked to whom he had talked in February,

1957, about releasing his brother on parole.[17] He was asked to describe the efforts he had made to assist in obtaining his brother's release.[18] Not only is it apparent on their face that these questions were not dependent upon the conversation overheard at the jail, but committee counsel unequivocally so testified at the petitioner's trial.[19] *Costello* v. *United States,* 365 U. S. 265, 279–280. Refusal to answer either of these questions fully supports the judgment as modified by the New York courts.[20] *Whitfield* v. *Ohio,* 297 U. S. 431, 438.

Moreover, the record contains no basis for supposing that the committee would not have called the petitioner to testify, had it not been in possession of a transcript of the recorded jail conversation—assuming, *arguendo,* that such an attenuated connection would help the petitioner's case. See *Costello* v. *United States, supra.* Indeed, it is reasonable to infer that the petitioner would have been interrogated even if the transcript of the conversation had not existed. The committee knew of the suspicious circumstances surrounding the release of the petitioner's brother.[21] The committee knew that the petitioner had been one of the three visitors the brother had had during

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[17] "Mr. Lanza, please tell the committee the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza."

[18] "On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole."

[19] "Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say, Mr. Direnzo, that that question as well as the previous one was not based upon any material in the tapes.

"Q. You are sure about that? A. Yes."

[20] See note 5.

[21] See note 1.

his stay in jail.[22] And the record shows that the committee had other independent information which could have occasioned the petitioner's interrogation. In short, we conclude that the ultimate constitutional claim asserted in this case, whatever its merits, is simply not tendered by this record.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

I do not understand anything in the Court's opinion to suggest either that the Fourteenth Amendment "incorporates" the provisions of the Fourth, or that the "liberty" assured by the Fourteenth Amendment is, with respect to "privacy," necessarily coextensive with the protections afforded by the Fourth. On that premise, I join the Court's opinion.

Memorandum opinion of MR. CHIEF JUSTICE WARREN.

I agree with MR. JUSTICE BRENNAN that the decision of the New York courts comes to us resting firmly upon an independent state ground and I therefore join his memorandum opinion. However, because the opinion of the Court departs from our practice of refusing to reach constitutional questions not necessary for decision, I deem it appropriate to add a few words.

Unquestionably, all that the Court's opinion decides is that since two of the questions asked petitioner by

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[22] The others were the brother's wife and his lawyer.

the Committee were not in any way related to the intercepted conversation, the refusal to answer those questions alone "fully supports the judgment as modified by the New York courts." *Ante,* p. 146. Despite the fact that this holding deprives the Court of jurisdiction to intimate views on the other, more serious problems of *constitutional* dimension presented by the record, *Herb* v. *Pitcairn,* 324 U. S. 117; *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U. S. 157; *Murdock* v. *Memphis,* 20 Wall. 590, and would warrant dismissing the writ as improvidently granted, *Benz* v. *New York State Thruway Authority,* 369 U. S. 147; *Atchley* v. *California,* 366 U. S. 207, the opinion undertakes, as MR. JUSTICE BRENNAN characterizes it, a "gratuitous exposition" upon those more difficult constitutional problems originally thought presented for decision. These expressions of dicta are in a form which can only lead to misunderstanding and confusion in future cases. Such dicta, when written into our decisions, have an unfortunate way of turning up in digests and decisions of lower courts; they are often quoted as evidencing the considered opinion of this Court, and this is so even though such intention is denied by the writer.

I am expressing my views separately because I believe that for several reasons it is particularly regrettable for the Court to depart from its normal practice in this case. The New York Court of Appeals, the highest court of the State, split 4–3 on the result reached below. And, because that court did not write a full opinion in announcing its decision, we cannot tell whether it intended to decide the constitutional issues or whether it even considered them. Its remittitur is unconvincing in determining whether its judgment was intended to rest on an independent state ground. See *Benz* v. *New York State Thruway Authority, supra.* What makes this Court's action singularly unfortunate is that the state courts, state offi-

cials and the people of New York State, have uniformly condemned the eavesdropping in this case as deplorable. The New York Appellate Division termed the action at the jail "reprehensible and offensive," *People* v. *Lanza,* 10 App. Div. 2d 315, 318, 199 N. Y. S. 2d 598, 601; earlier the court had called it "atrocious and inexcusable," *Lanza* v. *New York State Joint Legislative Committee,* 3 App. Div. 2d 531, 533, 162 N. Y. S. 2d 467, 470; also "flagrant and unprecedented," *Matter of Reuter,* 4 App. Div. 2d 252, 255, 164 N. Y. S. 2d 534, 538. In the Court of Appeals it was characterized as a "gross wrong," *Lanza* v. *New York State Joint Legislative Committee,* 3 N. Y. 2d 92, 101, 164 N. Y. S. 2d 9, 16, 143 N. E. 2d 772, 777 (dissenting opinion), and counsel for the Joint Committee made no effort to justify or excuse the action, but on the contrary himself called it "repulsive and repugnant," *ibid.* The Governor of New York termed unchecked eavesdropping "unwholesome and dangerous," McKinney's 1958 Session Laws of New York, 1837; and the Chairman of the New York Joint Legislative Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned [with] . . . efforts to protect the people's right of privacy." Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, 25. It has been reported that a New York trial court judge found it necessary to release a prisoner without bail so that he would be able to consult his attorney, the judge not being able to feel confident after this incident that there was any jail in the State where the prisoner and his lawyers could be secure against electronic eavesdropping. Comment, 27 Fordham L. Rev. 390, 394, n. 35. The most striking indication of the degree to which the people of the State of New York were shocked by the

incident was the enactment of Article 73 of the Penal Law of New York, making it a *felony* to do what the officials in this case did. And finally the Appellate Division of the Supreme Court, affirmed by the New York Court of Appeals, reduced the bizarre and unprecedented sentence of ten years for contempt of court to one year.

It seems to me that when this Court puts its imprimatur upon conduct so universally reproached by every branch of the government of the State in which the case arose, we invite official lawlessness which, in the long run, can be far more harmful to our society than individual contumacy.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur in this opinion.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join.

I must protest the Court's gratuitous exposition of several grave constitutional issues confessedly not before us for decision in this case. The tenor of the Court's wholly unnecessary comments is sufficiently ominous to justify the strongest emphasis that of the abbreviated Court of seven who participate in the decision, fewer than five will even intimate views that the constitutional protections against invasion of privacy do not operate for the benefit of persons—whether inmates or visitors—inside a jail, or that the petitioner lacks standing to challenge secret electronic interception of his conversations because he has not a sufficient possessory interest in the premises, or that the Fourth Amendment cannot be applied to protect against testimonial compulsion imposed solely as a result of an unconstitutional search or seizure.

The petitioner was convicted on several counts for failure to answer each of a number of questions put to him by

a state legislative committee. On appeal, the judgment, which had imposed 10 identical sentences to run consecutively, was modified by the Appellate Division to provide that the sentences on each count should run concurrently. The record shows, affirmatively and without rebuttal, that at least two of the questions were conceived and propounded independently of the search and seizure which the petitioner claims infringed his constitutional rights; and there is nothing which supports his contention that he would not have been questioned at all but for that claimed infringement.

Under these circumstances, it is apparent that the judgment of the Court of Appeals of New York can be adequately supported by an independent ground of state law. It is the settled law of that court that there is no occasion to review a conviction on one count of an indictment or information if the judgment and sentence are sufficiently sustained by another count.[1] Since this Court is thus able to see that the judgment of the court below—which is unelucidated by any opinion—is maintainable on an

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[1] See *People* v. *Faden*, 271 N. Y. 435, 3 N. E. 2d 584; *People* v. *Cummins*, 209 N. Y. 283, 103 N. E. 169; *Hope* v. *People*, 83 N. Y. 418; *People* v. *Davis*, 56 N. Y. 95. That is also the federal rule, see *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

In affirming the conviction, the Appellate Division found it unnecessary to pass on the petitioner's contention that he could be convicted of only a single crime because, the judgment having been modified to cause the sentences to run concurrently, "the conviction on any one count is sufficient to sustain the sentence . . . . (*People* v. *Faden*, 271 N. Y. 435, 444–445.)" 10 App. Div. 2d 315, 319, 199 N. Y. S. 2d 598, 603. The Court of Appeals, which in affirming without opinion modified the judgment to make clear that only a single crime had been committed, found no occasion to re-examine the sentence because "It is clear . . . that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed." 9 N. Y. 2d 895, 897, 175 N. E. 2d 833.

adequate, independent state ground, it should forbear from any further review of the case; for, in light of the clearly established New York law, a decision by this Court on the federal questions sought to be tendered here would be but an exercise in futility.[2] In any event, historic principles demand that any consideration of constitutional issues at least abide a clarification from the court below as to the basis for its judgment, in order "that this Court not indulge in needless dissertations on constitutional law." *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557.

I do not mean, however, that I would seek clarification in this case. It taxes credulity to suppose that the court below would disagree with the majority here that two of the counts are free of any taint, or depart from its own settled doctrine that even one such count requires affirmance. And even if this Court were somehow free to disregard the law of New York, the Court has in the past limited its review of a state conviction in accordance with "the rule, frequently stated by this court, that a judgment upon an indictment containing several counts, with a verdict of guilty upon each, will be sustained if any count is good, and sufficient in itself to support the judgment." *Whitfield* v. *Ohio*, 297 U. S. 431, 438.

While the Court does ultimately rest its disposition of the case on this ground, it does so by way of affirmance.

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[2] Compare *Bachtel* v. *Wilson*, 204 U. S. 36, in which the Court dismissed a writ of error to the Supreme Court of Ohio, which had written no opinion. The Court said, at p. 40: "Before we can pronounce [the judgment of the court below] in conflict with the Federal Constitution it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was. . . . We do not decide [that the state statute is to be given a construction which would render it constitutional], but we do hold that in view of the silence of the Supreme Court we are not justified in assuming that it [did not so construe the statute]."

It is at least arguable that the proper disposition is to dismiss the case because certiorari was improvidently granted. *Benz* v. *New York State Thruway Authority*, 369 U. S. 147; [3] *Fox Film Corp.* v. *Muller*, 296 U. S. 207. But in no event is it arguable that any of the constitutional questions the Court reaches are before it.

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[3] In *Benz, as* here, the Court of Appeals had granted the petitioner an amended remittitur reciting that it had necessarily passed upon a federal constitutional question, to wit: "Whether plaintiff was deprived of just compensation in violation of the due process clause of the Fourteenth Amendment." Notwithstanding that representation, we concluded that the Court of Appeals had "decided no more than" a question relating to state court jurisdiction. That action was entirely consistent with *Honeyman* v. *Hanan*, 300 U. S. 14, 18–19: "A certificate or statement by the state court that a federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a federal question which otherwise the record wholly fails to present." Indeed, as *Honeyman* v. *Hanan, supra*, and *Honeyman* v. *Hanan*, 302 U. S. 375, illustrate, proper pursuit of the matter when suspicions are aroused may disclose that a state court's certificate simply did not mean what it appeared, at first glance, to say.

The remittitur in this case recited: "Defendant argued that the imposition of penal sanctions for his refusal to answer certain questions deprived him of liberty without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that defendant's constitutional rights were not violated." The Court of Appeals wrote no opinion, and it is understood in New York that "affirmance without opinion is merely an adoption of the result reached by the Appellate Division, the reasoning of which is not necessarily adopted." Carmody's New York Practice (7th ed. 1956) 678. See *Commissioner* v. *Jackson*, 265 N. Y. 440, 441, 193 N. E. 262; *Soderman* v. *Stone Bar Associates, Inc.*, 208 Misc. 864, 867, 146 N. Y. S. 2d 233, 236. For all we can tell, the Court of Appeals concluded that the petitioner's "constitutional rights were not violated" by reasoning that the two untainted questions supported the conviction.

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TAYLOR ET AL. *v.* LOUISIANA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 773. Decided June 4, 1962.

Six Negroes were convicted in a state court of violating Louisiana's breach-of-the-peace statute and were fined and sentenced to jail. Four of them went into a waiting room customarily reserved for white people at a bus depot and, when requested by police to leave, they refused to do so, claiming that they were interstate passengers. The other two were arrested while sitting nearby in the automobile which had brought the six to the bus station. There was no evidence of violence; but the trial court said that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace and was sufficient evidence of guilt. It held that four had violated the breach-of-the-peace statute and that the other two had counseled and procured them to do so. *Held:* Since the only evidence to support the charge was that the defendants were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed by federal law in interstate transportation facilities, the judgments are reversed. Pp. 154–156.

Reversed.

Carl Rachlin and *Judith P. Vladeck* for petitioners.

Jack P. F. Gremillion, Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General, for respondent.

PER CURIAM.

Petitioners, six Negroes, were convicted of violating Louisiana's breach-of-the-peace statute, La. Rev. Stat., 1950, § 14:103.1,[1] and were given fines and jail terms by

[1] In relevant part, § 14:103.1 provides: "A. Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others . . . in or upon . . . any . . . public place or

the state court. The Louisiana Supreme Court declined to review their convictions, and the case is here on petition for a writ of certiorari which we have granted.

Four of the six petitioners went into the waiting room customarily reserved for white people at the Trailways Bus Depot in Shreveport, Louisiana, in order to take a bus to Jackson, Mississippi. The Chief of Police of Shreveport approached the four and asked them why they were in the station. They told him they were interstate passengers and wished to purchase tickets and obtain travel information. The Chief told them they could do this in the colored waiting room and ordered them to move on. When the four refused to leave, stating again that they were interstate passengers and asserting their rights under federal law, they were ordered to leave or be arrested. The spokesman of the group then said, "We have no choice; go ahead and arrest us." The police thereupon arrested the four of them. The other two petitioners were then arrested, while sitting nearby in the automobile which had brought the six to the bus station.

At the trial there was testimony that immediately upon petitioners' entry into the waiting room many of the people therein became restless and that some onlookers climbed onto seats to get a better view. Nevertheless, respondent admits these persons moved on when ordered to do so by the police. There was no evidence of violence. The record shows that the petitioners were quiet, orderly, and polite. The trial court said, however, that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace. It held the mere presence of the Negroes in the waiting room, as part

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building . . . and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality . . . in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana . . . shall be guilty of disturbing the peace."

of a preconceived plan, was sufficient evidence of guilt. It accordingly held that the four had violated the state breach-of-the-peace statute and that the other two had counseled and procured the others to commit the crime.

Here, as in *Garner* v. *Louisiana*, 368 U. S. 157, the only evidence to support the charge was that petitioners were violating a custom that segregated people in waiting rooms according to their race, a practice not allowed in interstate transportation facilities by reason of federal law.[2] *Boynton* v. *Virginia*, 364 U. S. 454, 459–460. And see *Mayor & City Council of Baltimore* v. *Dawson*, 350 U. S. 877 (public beaches); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (municipal golf courses); *Gayle* v. *Browder*, 352 U. S. 903 (bus); *New Orleans Park Assn.* v. *Detiege*, 358 U. S. 54 (municipal golf course and park). The judgments of conviction must therefore be

Reversed.

MR. JUSTICE HARLAN would grant certiorari and set the case for argument.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

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[2] "That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges." *Buchanan* v. *Warley*, 245 U. S. 60, 80–81.

CREEK NATION *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 124. Argued April 24, 1962.—Decided June 4, 1962.

Judgment affirmed by an equally divided Court.
Reported below: 152 Ct. Cl. 747.

Paul M. Niebell argued the cause and filed briefs for petitioner.

Ralph A. Barney argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Richard J. Medalie, Roger P. Marquis* and *Hugh Nugent.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

HOLDEN *v.* PIONEER BROADCASTING CO. ET AL.

APPEAL FROM THE SUPREME COURT OF OREGON.

No. 1092, Misc. Decided June 4, 1962.

Appeal dismissed and certiorari denied.
Reported below: 228 Ore. 405, 365 P. 2d 845.

Dale A. Rader and *Robert F. Maguire* for appellant.

Clarence J. Young for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

JEFFERSON LAKE SULPHUR CO. *v.* NEW JERSEY.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 861. Decided June 4, 1962.

Appeal dismissed and certiorari denied.
Reported below: 36 N. J. 577, 178 A. 2d 329.

Eberhard P. Deutsch, René H. Himel, Jr. and *Arthur C. Dwyer* for appellant.

Arthur J. Sills, Attorney General of New Jersey, *Theodore I. Botter,* First Assistant Attorney General, and *Charles J. Kehoe,* Deputy Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

PORTER *v.* AETNA CASUALTY & SURETY CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 604. Argued April 25, 1962.—Decided June 11, 1962.

Disability benefits paid by the United States to an incompetent veteran and deposited by his committee or guardian in an account in a federal savings and loan association are exempted from attachment by 38 U. S. C. § 3101 (a) when the deposits are readily available as needed for support and maintenance, actually retain the qualities of money and are not permanent investments. Pp. 159–162.

111 U. S. App. D. C. 267, 296 F. 2d 389, reversed.

Ethelbert B. Frey argued the cause and filed a brief for petitioner.

John L. Laskey argued the cause for respondent. With him on the brief was *Richard Whittington Whitlock.*

John G. Laughlin, Jr. argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick* and *Herbert E. Morris.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This case raises the question of whether benefits paid by the United States Veterans' Administration retain their exempt status under 38 U. S. C. § 3101 (a) [1] after being

[1] "(a) Payments of benefits due or to become due under any law administered by the Veterans' Administration shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States

deposited in an account in a federal savings and loan association. Petitioner, an incompetent Air Force veteran, had suffered a judgment at the hands of respondent. The latter in an effort to satisfy its judgment attached a checking account and two accounts in local federal savings and loan associations, all of which had been established by petitioner's Committee with funds received from the Veterans' Administration as disability compensation due the petitioner. The District Court, on motion, held all three of the accounts exempt under the statute. 185 F. Supp. 302. Respondent appealed as to the savings and loan association accounts, and the Court of Appeals for the District of Columbia reversed in a divided opinion. 111 U. S. App. D. C. 267, 296 F. 2d 389. Certiorari was granted in view of the importance of the question in the administration of the Act. 368 U. S. 937. We agree with the District Court that the funds involved here are exempt under the statute; therefore we reverse the judgment below.

Since 1873 it has been the policy of the Congress to exempt veterans' benefits from creditor actions as well as from taxation.[2] In 1933 in *Trotter* v. *Tennessee,* 290 U. S. 354, the Court had occasion to pass upon the exemptive provision of the World War Veterans' Act of 1924, 43 Stat. 607, 613. It held that the exemption spent its force when the benefit funds "lost the quality of moneys" and were converted into "permanent investments." This distinction was adopted by the Congress when the Act was

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arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity."

[2] Act of Mar. 3, 1873, R. S. § 4747 (1878); World War Veterans' Act of 1924, c. 320, § 22, 43 Stat. 607, 613; Act of Aug. 12, 1935, c. 510, § 3, 49 Stat. 607, 609.

amended in 1935, 49 Stat. 607, 609, to provide, *inter alia,* that such payments shall be exempt "either before or after receipt by the beneficiary" but that the exemption shall not "extend to any property purchased in part or wholly out of such payments." [3] Thereafter in *Lawrence* v. *Shaw,* 300 U. S. 245 (1937), the Court held that bank credits derived from veterans' benefits were within the exemption, the test being whether as so deposited the benefits remained subject to demand and use as the needs of the veteran for support and maintenance required. It was noted that the allowance of interest on such deposits would not destroy the exemption. Two years later the Court held that negotiable notes and United States bonds purchased with veterans' benefits and "held as investments" had no federal statutory immunity. *Carrier* v. *Bryant,* 306 U. S. 545 (1939). The Act was again amended in 1958, but no significant changes were made in the exemption provision. As so written it is here at issue.

It appears that the practices and procedures vary as to withdrawal of funds from federal savings and loan associations. Under the law the depositor is a shareholder rather than a creditor, and his deposits are subject to withdrawal only after a 30-day demand. However, the District Court found that a withdrawal from the accounts here involved could be made "as quickly as a withdrawal from a checking account . . . ." In addition, the integrity of the deposits was assured by federal supervision of the associations plus federal insurance of the accounts. Under such conditions the funds were subject to imme-

[3] The statutory language reads only that the exemption "as to taxation" shall not extend to property purchased with benefits. However, in *Carrier* v. *Bryant,* 306 U. S. 545 (1939), the Court held that benefits invested in property were also nonexempt from creditor actions, since they were not "payments of benefits due or to become due" and thus did not fall within the initial immunizing language.

diate and certain access and thus plainly had "the quality of moneys." As to whether the deposits were "permanent investments," we note they were not of a speculative character nor were they time deposits at interest. Moreover, it affirmatively appears that at times petitioner drew moneys from the savings and loan fund for his support and maintenance requirements and that no other funds whatever are now available to him, his disability payments having been cut off. It therefore appears clear to us that the savings and loan deposits here, rather than being investments, are the only funds presently available to meet petitioner's needs.

Since legislation of this type should be liberally construed, see *Trotter* v. *Tennessee, supra,* at 356, to protect funds granted by the Congress for the maintenance and support of the beneficiaries thereof, *Lawrence* v. *Shaw, supra,* at 250, we feel that deposits such as are involved here should remain inviolate. The Congress, we believe, intended that veterans in the safekeeping of their benefits should be able to utilize those normal modes adopted by the community for that purpose—provided the benefit funds, regardless of the technicalities of title and other formalities, are readily available as needed for support and maintenance, actually retain the qualities of moneys, and have not been converted into permanent investments.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS.

Heretofore the test of exemption under this Act has been whether the funds had taken the form of "permanent investments," on the one hand (*Trotter* v. *Tennessee,* 290 U. S. 354, 357), or on the other were "subject to

draft upon demand," as in the case of checking accounts. *Lawrence* v. *Shaw,* 300 U. S. 245, 250. Negotiable notes and United States bonds were held to be nonexempt in *Carrier* v. *Bryant,* 306 U. S. 545. Yet so far as we know, those notes and bonds may have had the same or a comparable degree of liquidity as the present share account in the federal savings and loan association enjoys. Today, however, we hold these accounts exempt. Stocks and bonds cannot, of course, be fractionalized and converted into cash in small amounts, such as may be done with savings accounts and checking accounts. But stocks and bonds may be so liquid as to be tantamount to cash in hand and therefore serve, as well as any bank deposit, the needs of the veteran.

By the standards announced in the earlier decisions share accounts in federal savings and loan associations are "investments." See *Wisconsin Bankers Assn.* v. *Robertson,* 111 U. S. App. D. C. 85, 294 F. 2d 714. They can be withdrawn only after 30 days' notice. The owner of a share account is a voting member of the association which, as the Court of Appeals noted, makes him "more nearly comparable to a stockholder of a bank than one of its depositors." 111 U. S. App. D. C. 267, 270, 296 F. 2d 389, 392. Moreover, the Home Owners' Loan Act, under which this federal association was created, makes clear that its purpose is "to provide local mutual thrift institutions in which people may *invest* their funds." 12 U. S. C. § 1464 (a). (Italics added.) Its capital [1] is in "shares" (12 U. S. C. § 1464 (b)) such as are involved here.

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[1] "Capital" means "the aggregate of the payments on savings accounts," plus earnings, less deductions. See 12 CFR § 541.3. "Savings account," such as we have here, is "the monetary interest of the holder" in the "capital" of the association. *Id.,* § 541.4. The account book evidences "the ownership of the account and the interest of the holder thereof in the capital" of the association. 12 CFR § 545.2 (b).

The holders of savings accounts who apply for a withdrawal of funds do not thereby become "creditors." [2]

In some States these share accounts may not be as liquid as checking accounts or even as liquid as stocks and bonds listed on an exchange or actively traded over-the-counter. The true test seems to me to be liquidity—that is to say, whether or not the moneys are kept in a form in which they are usable, if need be, "for the maintenance and support of the veteran," as Chief Justice Hughes said in *Lawrence* v. *Shaw, supra,* at 250.

[2] "Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors." 12 CFR § 544.1 (a) par. 6.

MORALES ET AL. *v.* CITY OF GALVESTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 480. Argued April 23–24, 1962.—Decided June 11, 1962.

Petitioners were longshoremen engaged in "trimming" wheat as it was being loaded by means of a spout directly from a pierside grain elevator owned and operated by the City of Galveston, Texas, into the hold of a ship berthed at the pier. A last "shot" of grain called for and released into the bin had been treated with a chemical insecticide, and petitioners were injured by fumes from the chemical made noxious by concentration in the closely confined area where they were working. They sued the City and the shipowner to recover for their injuries, claiming that the City and the shipowner had been negligent and that the ship was unseaworthy. *Held:* A judgment for the defendants is affirmed. Pp. 166–171.

(a) On the issue of negligence, a finding by the District Court, affirmed by the Court of Appeals, that the City had not itself applied the fumigant to the grain and that neither of the defendants knew, or in the exercise of reasonable care should have known, that the grain had been improperly fumigated by someone else at an inland point, was based upon substantial evidence, and this Court cannot say that it was clearly erroneous. Pp. 167–168.

(b) The District Court found, upon substantial evidence and under proper criteria, that the absence of a forced ventilation system in the hold did not make the ship unseaworthy and that the ship was not in any manner unfit for the service to which she was to be put; that finding was affirmed by the Court of Appeals; and this Court cannot say that it was wrong. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, distinguished. Pp. 168–171.

291 F. 2d 97, affirmed.

Arthur J. Mandell argued the cause and filed a brief for petitioners.

Preston Shirley argued the cause and filed briefs for the City of Galveston. *Edward W. Watson* argued the cause for the Cardigan Shipping Co., Ltd., respondent. On the briefs with *Mr. Watson* was *Clarence S. Eastham.*

MR. JUSTICE STEWART delivered the opinion of the Court.

On the afternoon of March 14, 1957, the S. S. *Grelmarion* was berthed at Galveston, Texas, taking on a cargo of wheat from a pierside grain elevator owned and operated by the city. The wheat was being loaded directly from the elevator into the ship by means of a spout. The petitioners were longshoremen engaged in "trimming" the wheat as it was received in the offshore bin of the vessel's No. 2 hold, which was then about three-quarters full. A last "shot" of grain was called for and was released into the bin. The grain in this last shot had been treated with a chemical insecticide, and the petitioners were injured by fumes from the chemical, made noxious by concentration in the closely confined area where they were working.

The petitioners brought the present suit against the City of Galveston and the owner of the vessel to recover for their injuries.[1] Their claim was predicated upon the negligence of the City and the shipowner, and upon the unseaworthiness of the ship. After an extended trial, the District Court entered judgment for the respondents, based upon detailed findings of fact, 181 F. Supp. 202, and the Court of Appeals affirmed, 275 F. 2d 191. On certiorari (364 U. S. 295) we vacated the judgment and remanded the case to the Court of Appeals for consideration in the light of *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, which had been decided in the interim. That court, one judge dissenting, was of the view that *Mitchell* was inapplicable to the facts of the present case, and again affirmed the District Court's judgment, 291 F. 2d

[1] Petitioners of course received compensation and medical treatment under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 *et seq.* 181 F. Supp., at 207.

97. We granted certiorari to consider a seemingly significant question of admiralty law. 368 U. S. 816.

The factual issues bearing upon the alleged negligence of the City and shipowner were determined in their favor by the District Court. Specifically, the court found that the City had *not* itself applied the fumigant to the grain in question, and that neither of the respondents knew, or in the exercise of reasonable care should have known, that the grain had been improperly fumigated at an inland point by someone else.[2] Even a cursory examination of

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[2] "14. I find that neither of the respondents knew, or in the exercise of reasonable care should have known, that this quantity of grain, which had been improperly treated with an excessive amount of fumigant, was in the elevator or loaded aboard the Grelmarion; and that (for all the evidence shows here) the respondent city, in the operation of its elevator, had never received knowledge of a prior instance where chloropicrin or other fumigants applied at inland elevators had adhered to the grain sufficiently long as to present danger after receipt by the elevator.

"15. I find that the respondent city was not negligent in failing to know or learn of the presence of this quantity of grain within its elevator, in failing to make some additional inspection therefor, or in any other particular. The record shows without dispute that careful and painstaking inspections and examinations were made under governmental authority when the grain was received, and again as it was disbursed by the elevator, which in the present instance failed to detect the presence of the remaining traces of fumigant in this quantity of grain. I find that had additional inspections been made by the respondent city, there is no reason to believe that such inspections would have been more successful.

. . . . . .

"17. I find that the Grelmarion's cargo spaces were of customary design and construction; that they were clean, and in all respects ready to receive the wheat; and had been surveyed and approved prior to loading. No fumigation for weevils was made aboard the vessel, and none was necessary. . . . I find . . . that her Captain, crew, agent, or other representatives were not negligent in any particular." 181 F. Supp. 202, at 205–207.

the lengthy record shows that these findings were based upon substantial evidence. They were re-examined and affirmed on appeal.[3] We cannot say that they were clearly erroneous. *McAllister* v. *United States*, 348 U. S. 19, 20–21.

Of greater significance in this litigation is the issue which prompted our remand to the Court of Appeals for reconsideration. Briefly stated, the question is whether, upon the facts as found by the District Court, it was error to hold that the *Grelmarion* was seaworthy at the time the petitioners were injured.[4]

In the *Mitchell* case, *supra*, we reversed a judgment for the defendant, because the District Court and the Court of Appeals had mistakenly imported concepts of common-law negligence into an action for unseaworthiness. There the jury had erroneously been instructed that liability for unseaworthiness could attach only if the alleged unseaworthy condition was "there for a reasonably long period of time so that a shipowner ought to have seen that it was removed." [5] The Court of Appeals had affirmed on the theory that, at least as to an unseaworthy condition that arises during the progress of the voyage, the shipowner's obligation "is merely to see that

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[3] "Careful consideration of, and reflection on, the claims and arguments of the opposing parties, in the light of the record and the controlling authorities, leaves us in no doubt that, as to the charges of negligence, there is no basis whatever for the attack here upon the findings as cleary erroneous. Indeed, we are convinced that, under an impartial and disinterested view of the evidence as a whole, the findings are well supported and wholly reasonable." 275 F. 2d, at 193.

[4] The District Court and the Court of Appeals, without discussion, proceeded upon the assumption that the petitioners belonged to the class to whom the respondent shipowner owed the duty of providing a seaworthy vessel. This was correct. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406.

[5] 362 U. S., at 540–541, n. 2.

reasonable care is used under the circumstances . . . incident to the correction of the newly arisen defect." [6] It was alleged in that case that a ship's rail which was habitually used as a means of egress to the dock was rendered unseaworthy by the presence of slime and gurry. We did not decide the issue, but reversed for a new trial under proper criteria, holding that the shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability, and that he has an absolute duty "to furnish a vessel and appurtenances reasonably fit for their intended use." 362 U. S., at 550.

In the present case the Court of Appeals was of the view that the trial judge's determination of the *Grelmarion's* seaworthiness at the time the petitioners were injured was in no way inconsistent with our decision in the *Mitchell* case. We agree. The District Judge did not, as in *Mitchell,* hold that unseaworthiness liability depends upon the shipowner's actual or constructive knowledge. He did not, as in *Mitchell,* indicate that liability may be excused if an unseaworthy condition is merely temporary. Rather, as the Court of Appeals pointed out, the trier of the facts found, upon substantial evidence, that "the cause of the injury was not any defect in the ship but the fact that the last shot of grain which was being loaded was contaminated . . . ." 291 F. 2d, at 98.

The trial court found, upon substantial evidence, that what happened was an unexpected, isolated occurrence. Several years before there had been three, or perhaps four, incidents involving injury to longshoremen from grain *which had been fumigated by the city itself.* But at the time the present case arose the city had adopted a series of safety and inspection measures which made completely innocuous the grain which it fumigated, and

[6] 265 F. 2d 426, 432.

"vast quantities of wheat and other grains had been loaded through the elevator, some eight to ten percent of which had been fumigated by the city, without similar incident in recent years." [7] The court found that the fumes in the present case came from "chloropicrin, an insecticide which had never been used by the respondent city." [8] The petitioners question none of these findings here. Under these circumstances we cannot say that it was error for the court to rule that the absence of a forced ventilation system in the hold did not constitute unseaworthiness.[9]

A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The method of loading her cargo, or the manner of its stowage, might be improper. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Pope & Talbot, Inc.*, v. *Hawn*, 346 U. S. 406; *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396; *Rogers* v. *United States Lines*, 347 U. S. 984; *Boudoin* v. *Lykes Bros. S. S. Co.*, 348 U. S. 336; *Crumady* v. *The J. H. Fisser*, 358 U. S. 423; *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines, Ltd.*, 369 U. S. 355. For any or all of these reasons, or others, a vessel might not be reasonably fit

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[7] 181 F. Supp., at 205.

[8] *Ibid.*

[9] ". . . While the Grelmarion's cargo spaces were not equipped with forced ventilation systems, I find that only very rarely is this the case on grain vessels, and that it is not necessary or customary. . . ."

"The finding heretofore has been made that the noxious gases and fumes were introduced into the bin with the last 'shot' of grain, and resulted from a fumigant that had been improperly applied, and that had adhered to the grain an unusually long period of time. Under these circumstances, I find that the admission thereof into the bin of the vessel did not cause the Grelmarion to become unseaworthy, the vessel and all its appurtenances being entirely adequate and suitable in every respect." 181 F. Supp., at 206–207.

for her intended service. What caused injury in the present case, however, was not the ship, its appurtenances, or its crew, but the isolated and completely unforeseeable introduction of a noxious agent from without. The trier of the facts ruled, under proper criteria, that the *Grelmarion* was not in any manner unfit for the service to which she was to be put, and we cannot say that his determination was wrong.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK concur, dissenting.

The District Court found that the libellants were injured in 1957 as a result of a release into the hold of a "shot" of grain that completely closed the hatch opening, which was the only source of ventilation for the hold in which they were working. This grain had been treated by chemicals for weevil infestation; and the noxious fumes from those chemicals injured libellants.

The vessel's cargo spaces were not equipped with a forced ventilation system. Grain vessels, the District Court found, rarely are so equipped; and it concluded that forced ventilation is "not necessary or customary." If this were an isolated instance of fumigated grain releasing noxious gases, no claim of unseaworthiness could be maintained. But this was not an isolated instance. Of the wheat loaded through this elevator, some 8 to 10% was fumigated by the city. Wheat is commonly fumigated either in the elevators or in railroad cars. When the fumigant is properly applied, the gases and fumes are dissipated so as not to be dangerous or harmful after 24 to 48 hours. The District Court found, however, that to the knowledge of the owners of the vessel several recent

incidents like that in the present case had occurred in Galveston, causing injury to longshoremen—one in 1949, one in 1950, two in 1953.

A vessel without a forced ventilation system would be seaworthy if this injury were an unexpected, isolated occurrence. But I agree with Judge Rives of the Court of Appeals that the vessel and her appurtenances were not "reasonably fit for their intended use" (291 F. 2d 97, 99), where up to 10% of the grain loaded from this elevator was fumigated and where the owners had knowledge of like accidents. One "intended service" of this vessel was, therefore, the loading of fumigated grain which in the past had given off noxious fumes. Unseaworthiness by reason of the absence of a forced ventilation system is clearer here than it was in *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, where temporary slime and gurry on the ship's rail rendered it unseaworthy. The unseaworthy condition in the present case had no such temporary span. What happened here shows that the vessel was unseaworthy whenever fumigated grain was being loaded.

Syllabus.

MARINE ENGINEERS BENEFICIAL ASSOCIATION ET AL. *v.* INTERLAKE STEAMSHIP CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 166. Argued April 16, 1962.—Decided June 11, 1962.

The two petitioner labor unions represented marine engineers employed on the Great Lakes and elsewhere. Respondents owned and operated a fleet of bulk cargo vessels on the Great Lakes, and the marine engineers employed by them were not represented by any union. In a suit brought by respondents, a State Court enjoined peaceful picketing and other activities by the petitioner unions of a kind arguably prohibited by § 8 (b) of the National Labor Relations Act, as amended, if the petitioner unions were "labor organizations" within the contemplation of § 8 (b). Although it was shown from recent decisions of the National Labor Relations Board involving these unions that the Board was of the opinion that they were such "labor organizations," the State Court held that they were not, on the ground that only "supervisory" personnel were involved in the dispute. *Held:* The dispute was arguably within the jurisdiction of the National Labor Relations Board, and, therefore, the State Court was precluded from exercising jurisdiction. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236. Pp. 174–185.

(a) The principles of *San Diego Building Trades Council* v. *Garmon* confined the State Court to deciding only whether the evidence in this case was sufficient to show that either of the petitioner unions was arguably a "labor organization" within the contemplation of § 8 (b). Pp. 177–182.

(b) The evidence in this case, including recent decisions of the National Labor Relations Board, was sufficient to deprive the State Court of jurisdiction over this controversy. Pp. 182–183.

(c) Evidence having been introduced to show that the petitioner unions were arguably "labor organizations" for the purposes of § 8 (b), it was the duty of the State Court to defer to the Board's determination, in the absence of a showing that this position had been authoritatively rejected by the courts or abandoned by the Board. P. 184.

260 Minn. 1, 108 N. W. 2d 627, reversed.

Lee Pressman argued the cause for petitioners. With him on the briefs was *Richard H. Markowitz.*

Raymond T. Jackson argued the cause for respondents. With him on the briefs was *James P. Garner.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, this Court held that the proper administration of the federal labor law requires state courts to relinquish jurisdiction not only over those controversies actually found to be within the jurisdiction of the National Labor Relations Board, but also over litigation arising from activities which might arguably be subject to that agency's cognizance. Only such a rule, the Court held, will preserve for the Labor Board its congressionally delegated function of deciding what is and what is not within its domain.[1] In the present case the Supreme Court of Minnesota held that the petitioners, Marine Engineers Beneficial Association (MEBA) and its Local 101, were not "labor organizations" within the meaning of § 8 (b) of the Labor Management Relations Act, 29 U. S. C. § 158 (b), and therefore not subject to the unfair labor practice provisions of that section of the statute. Accordingly, the court held that a state trial court had not erred in assuming jurisdiction over a labor dispute involving MEBA and Local 101, and in permanently enjoining them

[1] "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power and state jurisdiction too must yield to the exclusive primary competence of the Board." 359 U. S., at 244–245.

from picketing found to be in violation of state law. 260 Minn. 1, 108 N. W. 2d 627. We granted certiorari, 368 U. S. 811, to consider an asserted conflict between the Minnesota court's decision and our holding in the *Garmon* case.

The essential facts which gave rise to this controversy are not in dispute. The respondents owned and operated a fleet of bulk cargo vessels on the Great Lakes. MEBA and Local 101 were unions which represented marine engineers employed on the Great Lakes and elsewhere.[2] The marine engineers employed by the respondents were not represented by MEBA or any other union.

On November 11, 1959, the respondents' vessel, *Samuel Mather,* arrived at the dock of the Carnegie Dock and Fuel Company in Duluth, Minnesota. The following morning several members of Local 101 began to picket at the only entrance road to the Carnegie dock. They carried signs which read: "Pickands Mather Unfair to Organized Labor. This Dispute Only Involves P–M. M. E. B. A. Loc. 101 AFL–CIO." and "M. E. B. A. Loc. 101. AFL–CIO. Request P–M Engineers to Join with Organized Labor to Better Working Conditions. This Dispute Only Involves P–M." When the pickets appeared, employees of the Carnegie Dock and Fuel Company refused to continue unloading the *Samuel Mather.* As a result, the ship was forced to remain at the dock, and another of the respondents' steamers, the *Pickands,* was compelled to ride at anchor outside the harbor for a number of days, because the Carnegie dock could accommodate but one vessel at a time.

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[2] The record shows that Local 101 was hardly a "local" in the conventional sense of that term. It had branch offices not only throughout the Great Lakes area, but also in Brooklyn, San Francisco, and Houston, among other places, and there were "approximately 35 to 40 locals in 101; some are very small, some are very large."

Upon learning of the picket line, the respondents filed a complaint in the state court charging the union with several violations of state law. The complaint alleged, among other things, that the petitioners had induced Carnegie's employees to refuse to perform services, and that the petitioners had thus caused Carnegie to breach its contract with the respondents. The petitioners filed a motion to dismiss the complaint, claiming that the dispute was arguably subject to the jurisdiction of the National Labor Relations Board and thus, under the *Garmon* doctrine, beyond the state court's cognizance.[3] Evidence was taken concerning the nature and effect of the picketing, the employment status of respondents' marine engineers, and, to a limited extent, the characteristics of MEBA and Local 101. The trial court concluded that the dispute was within its jurisdiction, and, finding the picketing to be in violation of Minnesota law, it issued a temporary injunction prohibiting the petitioners from picketing at or near any site where the respondents' vessels were loading or unloading, from inducing other employees or other firms not to perform services for the respondents, and from interfering in other specified ways with the respondents' operations. The injunction was later made permanent on the basis of the same record, and the court's judgment was affirmed on review by the Supreme Court of Minnesota.

The *Garmon* case dealt with rules of conduct—whether certain activities were protected by § 7 or prohibited by § 8 of the Act. In the present case it has hardly been disputed, nor could it be, that the petitioners' conduct was of a kind arguably prohibited by § 8 (b)(4)(A) of the Act and thus within the primary jurisdiction of the Board, if MEBA and Local 101 were "labor organizations"

[3] Potential NLRB jurisdiction under § 8 (b) is the only basis upon which the petitioners have claimed preemption of state court jurisdiction. See note 4, *infra*.

within the contemplation of § 8 (b) generally.[4] The Minnesota courts determined, however, that those whom the petitioners represented and sought to enlist were "supervisors," that consequently neither of the petitioners was a "labor organization," and therefore that nothing in the *Garmon* doctrine precluded a state court from assuming jurisdiction.

It is the petitioners' contention that the issue to be determined in this case is not whether the state courts correctly decided their "labor organization" status, but whether the state courts were free to finally decide that issue at all. The petitioners contend that the principles of the *Garmon* decision confined the state court to deciding

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[4] On November 12, 1959, the day the picketing began, § 8 (b) (4) (A) provided as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

. . . . . .

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ." 29 U. S. C. § 158 (b) (4) (A).

Shortly thereafter the amendments made by the Labor-Management Reporting and Disclosure Act became effective, and § 8 (b) (4) (A) became § 8 (b) (4) (B), 29 U. S. C. (Supp. II) § 158 (b) (4) (B). The here-pertinent language of the amended sections remained virtually the same.

We express no opinion on the ultimate applicability of these provisions. Compare *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 N. L. R. B. 547, with *National Maritime Union (Standard Oil Co.)*, 121 N. L. R. B. 208, enforced, 274 F. 2d 167. See generally, *Local 761, Electrical Workers* v. *Labor Board*, 366 U. S. 667.

only whether the evidence in this case was sufficient to show that either of them was arguably a "labor organization" within the contemplation of § 8 (b). We agree, and hold that the evidence was sufficient to deprive the Minnesota courts of jurisdiction over this controversy.

We see no reason to assume that the task of interpreting and applying the statutory definition of a "labor organization" does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act to substantive conduct. Indeed, analysis of the problem makes clear that the process of defining the term "labor organization" is one which may often require the full range of Board competence.

The term "labor organization" is defined by § 2 (5) of the Act, which says:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U. S. C. § 152 (5).

The part of that definition at issue in the present case is the requirement that "employees participate" in the organization. As defined by § 2 (3) of the Act, "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor . . . ." 29 U. S. C. § 152 (3).[5] "Supervisor" is defined in turn by § 2 (11) of the Act to mean:

> ". . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off,

[5] The decision of Congress to forego regulation of labor relations between employers and their supervisory personnel was the product

> recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152 (11).

The statutory definition of the term "supervisor" has been the subject of considerable litigation before the NLRB and in the federal courts.[6] It is immediately apparent, moreover, that the phrase "organization . . . in which employees participate" is far from self-explanatory. Several recurring questions stem from the fact that na-

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of experience under the National Labor Relations Act of 1935. The Board's assumption of jurisdiction over supervisors under the 1935 Act was approved by this Court in *Packard Motor Car Co.* v. *Labor Board,* 330 U. S. 485. Congress passed the 1947 Act shortly thereafter, explicitly stating its purpose to free employers from compulsion to treat supervisory personnel as employees for the purpose of collective bargaining or organizational activity. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 3–5, 28; H. R. Rep. No. 245, 80th Cong., 1st Sess., pp. 13–17.

[6] Compare, *e. g., Globe Steamship Co.* (*Great Lakes Engineers Brotherhood*), 85 N. L. R. B. 475, with *National Maritime Union* (*Standard Oil Co.*), 121 N. L. R. B., at 209–210, and *Graham Transp. Co.* (*Brotherhood of Marine Engineers*), 124 N. L. R. B. 960. See generally, *Labor Board* v. *Brown & Sharpe Mfg. Co.,* 169 F. 2d 331; *Labor Board* v. *Edward G. Budd Mfg. Co.,* 169 F. 2d 571; *Ohio Power Co.* v. *Labor Board,* 176 F. 2d 385; *Labor Board* v. *Quincy Steel Casting Co.,* 200 F. 2d 293. Summarizing the many federal court decisions in this area, the Court of Appeals for the First Circuit recently said, ". . . the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor.'" *Labor Board* v. *Swift & Co.,* 292 F. 2d 561, 563.

tional or even local unions may represent both "employees" and "supervisors." [7] For example, is employee participation in any part of a defendant national or local union sufficient, or must "employees" be involved in the immediate labor dispute? [8] What percentage or degree of employee participation in the relevant unit is required? [9] If an organization is open to "employees" or solicits their membership, must there be a showing that there are actually employee members? And, if a local union is not itself a "labor organization," are there conditions under which it may become subject to § 8 (b) as an agent of some other organization which is? [10]

The considerations involved in answering these questions are largely of a kind most wisely entrusted initially to the agency charged with the day-to-day administration of the Act as a whole. The term "labor organization" appears in a number of sections of the Act. Section 8 (a)(2), for example, forbids employers to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U. S. C. § 158 (a)(2). Section 8 (a)(3) makes it an unfair labor practice for an employer, by certain discriminatory conduct, "to encourage or discourage membership in any labor organization . . . ." 29 U. S. C. § 158 (a)(3). Section 9 (c), dealing with the largely

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[7] See *Labor Board* v. *Edward G. Budd Mfg. Co.*, *supra*, n. 6; *International Brotherhood of Teamsters* (*Di Giorgio Wine Co.*), 87 N. L. R. B. 720, enforced, 89 U. S. App. D. C. 155, 191 F. 2d 642.

[8] See, *e. g.*, *National Marine Engineers Beneficial Assn.* v. *Labor Board*, 274 F. 2d 167, 173; *International Organization of Masters, Mates & Pilots* (*Chicago Calumet Stevedoring Co.*), 125 N. L. R. B. 113, 131–132.

[9] See, *e. g.*, *International Organization of Masters, Mates & Pilots* v. *Labor Board*, 48 L. R. R. M. 2624 (C. A. D. C. Cir. 1960).

[10] Compare *International Brotherhood of Teamsters* (*Di Giorgio Wine Co.*), 87 N. L. R. B., at 721, 743, with *National Maritime Union* (*Standard Oil Co.*), 121 N. L. R. B., at 210.

unreviewable area of representation elections,[11] refers repeatedly to both "employees" and "labor organizations." The policy considerations underlying these and other sections of the Act, and the relationship of a particular definitional approach under § 8 (b) to the meaning of the same term in the various sections, must obviously be taken into account if the statute is to operate as a coherent whole.[12] A centralized adjudicatory process is also essential in working out a consistent approach to the status of the many separate unions which may represent interrelated occupations in a single industry.[13] Moreover, as the national agency charged with the administration of federal labor law, the Board should be free in the first instance to consider the whole spectrum of possible approaches to the question, ranging from a broad definition of "labor organization" in terms of an entire union to a narrow case-by-case consideration of the issue. Only the Board can knowledgeably weigh the effect of either choice upon the certainty and predictability of labor management relations, or assess the importance of simple administrative convenience in this area.[14]

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[11] See *Leedom* v. *Kyne*, 358 U. S. 184.

[12] Cf. *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 N. L. R. B., at 741.

[13] Cf. *Globe Steamship Co. (Great Lakes Engineers Brotherhood)*, 85 N. L. R. B., at 478, 480.

[14] See *National Marine Engineers Beneficial Assn.* v. *Labor Board*, 274 F. 2d, at 175, where it was said:

"We earnestly suggest to the Board that the issue whether these two unions, whose activities concern almost every ocean and inland port of the United States, are 'labor organizations' within the meaning of the National Labor Relations Act deserves more thorough treatment than it has had here. Such an investigation would not, of course, have to be performed in every case. Once the Board determined on the basis of a full inquiry that MEBA and MMP were or were not labor organizations, the Board could rely on this unless there was evidence of a change."

For these reasons we conclude that the task of determining what is a "labor organization" in the context of § 8 (b) must in any doubtful case begin with the National Labor Relations Board, and that the only workable way to assure this result is for the courts to concede that a union is a "labor organization" for § 8 (b) purposes whenever a reasonably arguable case is made to that effect. Such a case was made in the Minnesota courts.

There persuasive evidence was introduced to show that all the marine engineers employed by the respondents were in fact supervisors.[15] It was also shown that MEBA had steadfastly maintained in proceedings before the NLRB that it was *not* a labor organization subject to § 8 (b) of the Act.[16] However, the petitioners introduced into the record two recent Board decisions, one holding

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[15] The trial court relied, in part, upon the 1949 Labor Board decision in *Globe Steamship Co., supra,* n. 6, which held that certain marine engineers employed on Great Lakes vessels, including those of respondents, were "supervisors" for the purpose of a § 9 (c) election petition.

[16] Respondents introduced an affidavit, filed by MEBA in a prior NLRB proceeding, in which the union claimed to represent only supervisors. This is the affidavit quoted in note 1 of the dissenting opinion, *post,* p. 185. But, as petitioners pointed out, the Board concluded then, and has continued of the view, that petitioners are "labor organizations" despite such assertions.

The petitioners did not attempt to introduce specific evidence in the state court to prove that they actually represented employees who were not supervisors. Indeed, the record would seem to indicate that MEBA and Local 101 would ultimately prefer to be classified as supervisory unions outside the ambit of § 8 of the Federal Act. The actual assertion of NLRB jurisdiction over these unions, however, at the very time the state court action was pending, was more than sufficient to create an arguable case for NLRB jurisdiction under § 8. It would be entirely inconsistent with our holding in *Garmon* to require the unions affirmatively to abandon in the state court the position they wished to maintain before the NLRB. It would be equally inconsistent to give evidentiary weight to union affidavits dredged up from prior NLRB proceedings in which the Board rejected the union's self-characterizing claims.

that MEBA was subject to § 8 (b) and was guilty of an unfair labor practice for engaging in an activity similar to that involved in this case,[17] and the other holding that marine engineers represented by a branch of Local 101 were "employees" for the purpose of a § 9 (c) election.[18] The Board's order in the first case was enforced by the Court of Appeals for the Second Circuit on January 13, 1960, during the pendency of the present litigation in the Minnesota trial court.[19] The state court's attention was expressly called to the Board's theory, subsequently adopted by the Court of Appeals for the Second Circuit, that the relevant unit of membership for determining what is a labor organization in a § 8 (b) context is the entire union, and to the holding that the known membership of a few "employees," provisions in the union's constitution making membership available to "employees," and previous conduct indicative of "employee" representation were sufficient to render the national union a "labor organization." See 121 N. L. R. B., at 209–210; 274 F. 2d, at 174–175. Three additional District Court decisions expressly holding that the Board had reasonable cause to believe that MEBA or Local 101 was subject to § 8 (b) had been decided before the issuance of the Minnesota trial court's judgment in the present litigation, although the record does not show that these were specifically brought to the court's attention.[20]

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[17] *National Maritime Union* (*Standard Oil Co.*), *supra*, n. 4.

[18] *Graham Transp. Co.* (*Brotherhood of Marine Engineers*), *supra*, n. 6. An official of Local 101 testified on direct examination that the Brotherhood of Marine Engineers "was merged in our local" on May 29, 1959.

[19] *National Marine Engineers Beneficial Assn.* v. *Labor Board*, *supra*, n. 8.

[20] *Schauffler* v. *Local 101, Marine Engineers Ben. Assn.*, 180 F. Supp. 932; *Penello* v. *Seafarers' International Union*, 40 L. R. R. M. 2180 (D. C. E. D. Va., 1957); *Douds* v. *Seafarers' International Union*, 148 F. Supp. 953.

This was a case, therefore, where a state court was shown not simply the arguable possibility of Labor Board jurisdiction over the controversy before it, but that the Board had actually determined the underlying issue upon which its jurisdiction depended, *i. e.*, that MEBA was a "labor organization" for purposes of § 8 (b) of the Act. In the absence of a showing that this position had been authoritatively rejected by the courts,[21] or abandoned by the Labor Board itself, we hold that it was the duty of the state court to defer to the Board's determination.[22]

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[21] The trial court noted that the Court of Appeals for the Second Circuit had determined that MEBA was not a "labor organization" within the meaning of § 301 of the federal statute. *A. H. Bull Steamship Co.* v. *National Marine Eng. B. Assn.*, 250 F. 2d 332. This case was subsequently distinguished by the Second Circuit in a case under § 8 (b), *National Marine Engineers Beneficial Assn.* v. *Labor Board, supra,* n. 8, and in *United States* v. *National Marine Engineers' Ben. Assn.*, 294 F. 2d 385. Subsequent to the trial court's decision in the present case the Court of Appeals for the District of Columbia Circuit ordered the NLRB to take additional evidence and to reconsider its determination of a similar maritime union's status as a "labor organization." *International Organization of Masters, Mates & Pilots* v. *Labor Board, supra,* n. 9. At the most these court decisions would only serve to cast some doubt on the validity of the Board's determination. But even if the doubt were much more substantial, the *Garmon* doctrine would require a state court to decline jurisdiction of the controversy.

[22] To distinguish the several NLRB decisions on the ground that each involved marine engineers whose jobs were unlike those of the respondents' engineers, as the Minnesota courts sought to do, is inconsistent with all that *Garmon* teaches. Such a distinction can be made only on the assumption that the relevant unit in determining what is a "labor organization" for purposes of § 8 (b) is no more than the group of employees involved in the then-pending dispute. The validity of this very assumption is currently being litigated before the Labor Board and reviewing courts. Far from having been authoritatively accepted, this limited view of the relevant unit has at least twice been expressly rejected. *National Marine Engineers Beneficial Assn.* v. *Labor Board,* 274 F. 2d, at 173, enforcing 121 N. L. R. B. 208; *International Organization of Masters, Mates & Pilots* (*Chicago*

The need for protecting the exclusivity of NLRB jurisdiction is obviously greatest when the precise issue brought before a court is in the process of litigation through procedures originating in the Board. While the Board's decision is not the last word, it must assuredly be the first. In addition, when the Board has actually undertaken to decide an issue, relitigation in a state court creates more than theoretical danger of actual conflict between state and federal regulation of the same controversy.[23] "Our concern" here, as it was in the *Garmon* case, 359 U. S., at 246, "is with delimiting areas . . . which must be free from state regulation if national policy is to be left unhampered."

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

While I agree with the principles announced by the Court, I disagree with the result that is reached on the facts of this case. The record contains an affidavit of the President of this union, the Marine Engineers Beneficial Association (MEBA), which states that all members of the union, including the local involved in this case, perform supervisory functions.[1]

Calumet Stevedoring Co.), 125 N. L. R. B., at 131–132, remanded for reconsideration on other grounds, 48 L. R. R. M. 2624 (C. A. D. C. Cir. 1960).

[23] Illustrative of this danger is a recent Federal District Court decision granting an application by a Regional Director of the Board for a temporary injunction against Local 101 prohibiting organizational activity similar to that involved in the present case. *Schauffler* v. *Local 101, Marine Engineers Ben. Assn.*, *supra*, n. 20. See also other cases cited, n. 20, *supra*.

[1] "I can state most categorically that licensed marine engineers who comprise the entire members of MEBA, without a single exception in the nature of their work, have authority in the interests of the em-

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An officer of MEBA testified:

> "Local 101 of the Marine Engineers Beneficial Association is comprised of those men who are licensed as marine engineers by the United States Coast Guard, and those men who perform the engineering duties of engineers, whether or not they are licensed by the Coast Guard."

The record makes clear that a licensed engineer has supervisory duties whenever there is someone working under him. That status is grounded in the historic distinction between licensed and unlicensed personnel and is shown by this record.[2] A union of masters and mates

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ployer for whom they may be working to hire, transfer, suspend, lay off, recall, promote, discharge, fine, reward or discipline the unlicensed personnel who work in the engine department, over which the licensed engineers have supervision or responsibility to direct such unlicensed personnel in the engine department or adjust the grievances of the unlicensed personnel in the engine department, or to effectively recommend any such action. In furtherance of their duties, licensed engineers do not exercise the authority just described merely as a routine or clerical nature, but they must exercise the use of independent judgment. Every single member of MEBA performs work of the nature which I have just described. The type of marine personnel over whom the MEBA assumes jurisdiction and takes in as members, is precisely that which I have just described. We do not have any members who do not fall within such description, insofar as their duties and responsibilities are concerned."

[2] The findings state: "All engineers and assistant engineers employed on Interlake vessels stand watches during which they are in charge of and responsible for the operation and condition of the vessel's propulsion mechanism and responsibly direct, control and supervise the work of the firemen, oilers and coal passers on duty during such watch; they hire, fire, transfer and change the status of and discipline the persons working under them and have authority to and do make effective recommendations respecting the employment and tenure of employment of the people working under them; they handle initially grievances of the employees who are subject to their supervision; the exer-

would plainly be a union of supervisors and under present law not be qualified to represent ordinary seamen. If there are rare instances when an engineer on a tug, for example, is nothing more than an employee, that has not been shown in the record and is directly contrary to the affidavit of this union's president.

The trial court in this case said that the record "does not show" that this MEBA Local "admits to membership any non-supervisory employee, and in any event it is clear that its membership is composed primarily and almost exclusively of supervisors." That finding is not challenged here. Petitioners, placing all their hopes on the words of the trial court that this local is composed "primarily and almost exclusively of supervisors," say it may therefore be arguably and reasonably contended that the local is a labor organization within the meaning of the Act.

Section 2 (5) defines "labor organization" as any organization "in which employees participate" for the purpose "of dealing with employers concerning grievances," etc.

The word "employee" was redefined by Congress [3] following our decision in *Packard Co.* v. *Labor Board,* 330 U. S. 485, so as to exclude "any individual employed as a supervisor." § 2 (3). And § 14 (a) provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

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cise of authority by the engineers and assistant engineers requires the use of independent judgment and discretion; and all such engineers are required to be licensed by the United States Coast Guard."

[3] See H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 23; S. Rep. No. 105, 80th Cong., 1st Sess., p. 28.

There is not a shred of evidence in this record showing that any employee *not a supervisor* is a member of this union. There is therefore not a shred of evidence to show that this local of MEBA is a "labor organization." Since there is not, it has made no showing that it is entitled to any of the protections of the Federal Act. Such a showing is within its power to make. It apparently claims to be a "labor organization" when it is to its advantage to do so and protests against being so labeled when that position serves its end.[4]

If it desires the protection of the Federal Act, it should be required to come forth with evidence showing who its members are. In absence of such a showing, we should not disturb the rulings of the Minnesota courts, which on this record were fully justified in enjoining the picketing. It was indeed conceded by counsel for MEBA at the trial that the purpose of the picketing was "to improve the wages, hours and working conditions" of the "licensed engineers," not the wages, hours and working conditions of those few undisclosed individuals who it is now intimated may have been members of the union.

Since this local is not on this record a "labor organization," it does not come within the purview of § 8 (b)(2) or § 8 (b)(4), which makes certain practices, alleged to have taken place here, unfair labor practices. For § 14, quoted above, returned supervisors to the basis which they enjoyed prior to the Federal Act. *Bull S. S. Co.* v. *National Marine Eng. B. Assn.*, 250 F. 2d 332.

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[4] Cf. with the decision below the contentions of MEBA in *National Marine Engineers Ben. Assn.* v. *Labor Board*, 274 F. 2d 167, 170 ("MEBA says its membership is composed exclusively of supervisors") and *Schauffler* v. *Local 101, Marine Engineers Ben. Assn.*, 180 F. Supp. 932, 935 (where the local involved in the present case argued that it was not a labor organization within the meaning of the Act). In *National Organization of Masters, Mates, and Pilots of America, et al.*, 116 N. L. R. B. 1787, MEBA admitted it was a "labor organization" within the meaning of the Act.

It matters not that at other times this local or MEBA may have been a "labor organization" for purposes of the Federal Act.[5] Apparently an engineer may at times be only an ordinary employee.[6] So for one operation this local may have members doing the work of nonsupervisory employees. Whether its status would therefore change from day-to-day or week-to-week might be presented in some case. It is not presented here, for, on a record showing only supervisors among the membership list, the union has no claim to shelter under the Federal Act.

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[5] The finding of the Labor Board in *National Marine Engineers Ben. Assn.* v. *Labor Board*, 274 F. 2d 167, that MEBA was a "labor organization" turned on a narrow procedural point mentioned by the Court of Appeals: "MEBA and MMP know who their members are and, if they do not know what their members do, certainly they can find out. The Board could properly have thought that the matters placed in the record by the general counsel justified an inference that non-supervisors do participate in MEBA and MMP, and that this sufficed for the Board's finding to that effect unless they were rebutted by more convincing evidence than the unions offered here. We therefore cannot say the Board's finding that MEBA and MMP were labor organizations did not meet the standards laid down in *Universal Camera Corp.* v. *N. L. R. B.*, 1951, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456." 274 F. 2d, at 175.

[6] See *National Marine Engineers Ben. Assn.* v. *Labor Board*, 274 F. 2d 167, 172–173: "The Board's general counsel did not dispute that two of the three engineers on the Franklin D. Roosevelt, the chief engineer and the relief chief engineer, were supervisors; but there was much argument whether the third should be so considered since he exercised supervisory duties only when neither the chief engineer nor the relief chief engineer was about. See *N. L. R. B.* v. *Quincy Steel Casting Co.*, 1st Cir., 1952, 200 F. 2d 293. The general counsel claimed that at least one of the engineers on the Sandra Marie could not have been a supervisor since he had no one to supervise. See *General Foods Corp.*, 110 N. L. R. B. 1088 (1954). MEBA disputed this, as well as the contention relating to the third engineer on the Franklin D. Roosevelt, claiming that these engineers were qualified and on these ships normally would have someone to supervise."

W. M. C. A., INC., ET AL. *v.* SIMON, SECRETARY OF STATE OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 836. Decided June 11, 1962.

A three-judge Federal District Court dismissed a complaint under the Civil Rights Act and 28 U. S. C. § 1343 alleging violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment by New York State's constitutional and statutory provisions governing apportionment of State Senate and Assembly districts. *Held:* The judgment is vacated and the case is remanded for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186. Pp. 190–191.

Reported below: 202 F. Supp. 741.

Leonard B. Sand and *Max Gross* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Irving Galt*, Assistant Solicitor General, *George C. Mantzoros* and *Gretchen W. Oberman*, Assistant Attorneys General, *Sheldon Raab*, Deputy Assistant Attorney General, *Leo A. Larkin*, *Benjamin Offner*, *Bertram Harnett* and *Francis J. Morgan* for appellees.

PER CURIAM.

On January 11, 1962, the three-judge District Court dismissed the complaint alleging violation of the Constitution of the United States by New York State's constitutional and statutory provisions governing apportionment of State Senate and Assembly Districts. 202 F. Supp. 741. The three judges filed separate opinions, no two of which supported the judgment of dismissal on identical grounds. One opinion expressed the view that the action should be dismissed for failure to state a claim, want of

justiciability, and want of equity. 202 F. Supp., at 742. A second opinion expressed the view that since the apportionment was not alleged to effect a discrimination against any particular racial or religious group, but merely a geographical discrimination, jurisdiction should be exercised, but only to dismiss. 202 F. Supp., at 754. A third opinion rested on the ground that the action was not justiciable and expressed no view on the merits. 202 F. Supp., at 755.

On March 26, 1962, we held in *Baker* v. *Carr,* 369 U. S. 186, that a justiciable federal constitutional cause of action is stated by a claim of arbitrary impairment of votes by means of invidiously discriminatory geographic classification. Our well-established practice of a remand for consideration in the light of a subsequent decision therefore applies. As in *Scholle* v. *Hare,* 369 U. S. 429, we believe that the court below should be the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination. The judgment is vacated and the case is remanded for further consideration in the light of *Baker* v. *Carr, supra.*

The motions to substitute Paul R. Screvane in the place of Abe Stark, and Eugene H. Nickerson in the place of A. Holly Patterson, as parties appellee, are granted.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, dissenting.

For reasons given in my dissent in *Scholle* v. *Hare,* 369 U. S. 429, 430, I would affirm, or, failing that, note probable jurisdiction. The complaint in this case squarely tenders the issue as to whether the Equal Protection

Clause of the Federal Constitution is violated by a state apportionment of seats in both its legislative chambers on other than a substantially proportional populational basis. As in *Scholle*, the lower court considered this claim on the merits and rejected it by holding that the existing distribution of New York State legislators (founded on principles embodied in the State Constitution since 1894) violated no federal constitutional right.

I read the opinions below quite differently than does the Court. The first opinion is that of Judge Levet, which the Court states "expressed the view that the action should be dismissed for failure to state a claim, want of justiciability, and want of equity." After first holding that the Court had jurisdiction over the action, Judge Levet held that "the complaint fails to state a claim upon which relief can be granted" (202 F. Supp., at 753), in that "[t]here is no authoritative indication that the relative weight accorded individual votes in elections for the state legislature, pursuant to the applicable provisions of the State Constitution, *is protected by the equal protection clause of the Fourteenth Amendment.* In fact, the contrary seems true." *Id.*, at 749. (Emphasis added.) He then proceeded further: "If the insufficiency of the complaint be not adequate to require dismissal of the complaint, as I believe it is, then the want of equity in the relief sought, or, to view it slightly differently, want of justiciability, clearly demands dismissal." *Id.*, at 753.

The second opinion is that of Judge Ryan, described by the Court as expressing "the view that since the apportionment was not alleged to effect a discrimination against any particular racial or religious group, but merely a geographical discrimination, jurisdiction should be exercised, but only to dismiss." Actually, however, Judge Ryan agreed with Judge Levet, stating at the outset of his separate opinion: "I concur with Judge Levet and the con-

clusions he has reached that this Court has jurisdiction to entertain this suit and that the complaint should be dismissed *on its merits.*" *Id.*, at 754. (Emphasis added.) He went on to state: "The complaint is that the method of apportionment gives rise solely to territorial or purely geographical discrimination which grossly dilutes the vote of urban dwellers. Judicial interference by federal courts with the power of the state to create internal political or geographical boundaries affecting the right of suffrage can not be supported by mere territorial discrimination and nothing more." *Ibid.* While this language, taken in connection with some of that which precedes it (*ibid.*), might lend itself to the view that Judge Ryan was thinking only in terms of "justiciability," I do not think it is properly so read. Judge Ryan nowhere suggests that he disagrees with Judge Levet's further, and distinctive, ground for dismissal, that the complaint failed to state a federal constitutional claim.

The third opinion, that of Judge Waterman, did, as the Court says, turn only on "non-justiciability." Judge Waterman declined to "express any views with reference to whether the present legislative apportionment in the State of New York violates the Fourteenth Amendment to the United States Constitution," *id.*, at 755, thereby evincing his understanding that his colleagues had also rested decision on a ground which he found unnecessary to reach.

For me, it thus seems clear that two members of the three-judge court dismissed the action on two alternative grounds: (1) that the matter was not "justiciable"; (2) that the complaint stated no cause of action, in that the "territorial discrimination" existing under New York's legislative apportionment did not give rise to a claim cognizable under the Fourteenth Amendent. The latter ground was precisely the issue that was avoided in *Baker*

v. *Carr*, 369 U. S. 186, 330 (dissenting opinion); see also *id.*, at 265 (concurring opinion).

It is unfortunate that the Court, now for the second time, has remanded a case of this kind without first coming to grips itself with this basic constitutional issue, or even indicating any guidelines for decision in the lower courts. *Baker* v. *Carr*, *supra*, of course did neither.

Syllabus.

SINCLAIR REFINING CO. *v.* ATKINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 434. Argued April 18, 1962.—Decided June 18, 1962.

This suit under § 301 (a) of the Labor Management Relations Act, 1947, was brought by an employer to enjoin work stoppages, strikes, peaceful picketing and similar activities by labor unions and their officers and members, allegedly in violation of a collective bargaining agreement containing a no-strike clause and providing a grievance procedure culminating in compulsory, final and binding arbitration of "any difference regarding wages, hours or working conditions." *Held:* Such an injunction was barred by § 4 of the Norris-LaGuardia Act, which, with exceptions not here material, bars federal courts from issuing injunctions "in any case involving or growing out of any labor dispute." Pp. 196–215.

(a) This case involved a "labor dispute" within the meaning of the Norris-LaGuardia Act—even if the alleged work stoppages and strikes constituted breaches of a collective bargaining agreement. Pp. 199–203.

(b) The subsequent enactment of § 301 of the Labor Management Relations Act, 1947, authorizing suits in federal courts "for violation of contracts between an employer and a labor organization" has not so narrowed the provisions of § 4 of the Norris-LaGuardia Act as to permit the injunctions originally proscribed thereby when such injunctions are sought as remedies for breaches of a collective bargaining agreement. Pp. 203–210.

(c) *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30; *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, distinguished. Pp. 210–213.

(d) Section 301 of the Labor Management Relations Act, 1947, presents no real conflict with the anti-injunction provisions of the Norris-LaGuardia Act. Pp. 213–215.

290 F. 2d 312, affirmed.

George B. Christensen argued the cause for petitioner. With him on the briefs were *Fred H. Daugherty* and *Richard W. Austin.*

Gilbert A. Cornfield argued the cause for respondents. With him on the briefs were *Gilbert Feldman* and *William E. Rentfro.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The question this case presents is whether § 301 of the Taft-Hartley Act, in giving federal courts jurisdiction of suits between employers and unions for breach of collective bargaining agreements,[1] impliedly repealed § 4 of the pre-existing Norris-LaGuardia Act, which, with certain exceptions not here material, barred federal courts from issuing injunctions "in any case involving or growing out of any labor dispute." [2]

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[1] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185 (a).

[2] "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

. . . . . .

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

. . . . . .

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . ." 47 Stat. 70, 29 U. S. C. § 104.

The complaint here was filed by the petitioner Sinclair Refining Company against the Oil, Chemical and Atomic Workers International Union and Local 7–210 of that union and alleged: that the International Union, acting by and with the authority of the Local Union and its members, signed a written collective bargaining contract with Sinclair which provided for compulsory, final and binding arbitration of "any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations"; that this contract also included express provisions by which the unions agreed that "there shall be no slowdowns for any reason whatsoever" and "no strikes or work stoppages . . . [f]or any cause which is or may be the subject of a grievance"; and that notwithstanding these promises in the collective bargaining contract the members of Local 7–210 had, over a period of some 19 months, engaged in work stoppages and strikes on nine separate occasions, each of which, the complaint charged, grew out of a grievance which could have been submitted to arbitration under the contract and therefore fell squarely within the unions' promises not to strike. This pattern of repeated, deliberate violations of the contract, Sinclair alleged, indicated a complete disregard on the part of the unions for their obligations under the contract and a probability that they would continue to "subvert the provisions of the contract" forbidding strikes over grievances in the future unless they were enjoined from doing so. In this situation, Sinclair claimed, there was no adequate remedy at law which would protect its contractual rights and the court should therefore enter orders enjoining the unions and their agents "preliminarily at first, and thereafter permanently, from aiding, abetting, fomenting, advising, participating in, ratifying, or condoning any strike, stoppage of work,

slowdown or any other disruption of, or interference with normal employment or normal operation or production by any employee within the bargaining unit at plaintiff's East Chicago, Indiana refinery covered by the contract between the parties dated August 8, 1957, in support of, or because of, any matter or thing which is, or could be, the subject of a grievance under the grievance procedure of the said contract, or any extension thereof, or any other contract between the parties which shall contain like or similar provisions." [3]

The unions moved to dismiss this complaint on the ground that it sought injunctive relief which United States courts, by virtue of the Norris-LaGuardia Act, have no jurisdiction to give. The District Court first denied the motion, but subsequently, upon reconsideration after full oral argument, vacated its original order and granted the unions' motion to dismiss.[4] In reaching this conclusion, the District Court reasoned that the controversy between Sinclair and the unions was unquestionably a "labor dispute" within the meaning of the Norris-LaGuardia Act and that the complaint therefore came within the proscription of § 4 of that Act which "withdraws jurisdiction from the federal courts to issue injunctions to prohibit the refusal 'to perform work or remain in any relation of employment' in cases involving *any* labor dispute." [5] The Court of Appeals for the Seventh Circuit affirmed the order of dismissal for the same reasons.[6] Because this decision presented a conflict with the deci-

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[3] The suit filed by Sinclair was in three counts, only one of which, Count 3, is involved in this case. Counts 1 and 2, upon which Sinclair prevailed below, are also before the Court in No. 430. See *Atkinson* v. *Sinclair Refining Co.*, *post*, p. 238, decided today.

[4] 187 F. Supp. 225.

[5] *Id.*, at 228.

[6] 290 F. 2d 312.

sion on this same important question by the Court of Appeals for the Tenth Circuit,[7] we granted certiorari.[8]

We agree with the courts below that this case does involve a "labor dispute" within the meaning of the Norris-LaGuardia Act. Section 13 of that Act expressly defines a labor dispute as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [9] Sinclair's own complaint shows quite plainly that each of the alleged nine work stoppages and strikes arose out of a controversy which was unquestionably well within this definition.[10]

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[7] *Chauffeurs, Teamsters & Helpers Local No. 795* v. *Yellow Transit Freight Lines*, 282 F. 2d 345. Both the First and the Second Circuits have also considered this question and both have taken the same position as that taken below. See *W. L. Mead, Inc.*, v. *Teamsters Local No. 25*, 217 F. 2d 6; *Alcoa S. S. Co.* v. *McMahon*, 173 F. 2d 567; *In re Third Ave. Transit Corp.*, 192 F. 2d 971; *A. H. Bull Steamship Co.* v. *Seafarers' International Union*, 250 F. 2d 326.

[8] 368 U. S. 937.

[9] 47 Stat. 73, 29 U. S. C. § 113.

[10] The allegations of the complaint with regard to the nine occurrences in question are as follows:

"(a) On or about July 1, 1957, six employees assigned to the #810 Crude Still stopped work in support of an asserted grievance involving the removal of Shift Machinists from the #810 Still area;

"(b) On or about September 17, 1957, all employees employed in the Mason Department refused to work on any shift during the entire day; the entire Mechanical Department refused to work from approximately noon until midnight; the employees of the Barrel House refused to work from the middle of the afternoon until midnight; a picket line was created which prevented operators from reporting to work on the 4:00 P. M. to midnight shift, all in support of an asserted grievance on behalf of five apprentice masons for whom

Nor does the circumstance that the alleged work stoppages and strikes may have constituted a breach of a collective bargaining agreement alter the plain fact that a "labor dispute" within the meaning of the Norris-LaGuardia Act is involved. Arguments to the contrary proceed from the premise that § 2 of that Act, which

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insufficient work was available to permit their retention at craft levels.

"(c) On or about March 28, 1958, approximately 73 employees in the Rigging Department refused to work for approximately one hour in support of an asserted grievance that riggers were entitled to do certain work along with machinists.

"(d) On or about May 20, 1958, approximately 24 employees in the Rigging Department refused to work for 1¾ hours in support of an asserted grievance that riggers were entitled to do certain work along with boilermakers.

"(e) On or about September 11, 1958, approximately 24 employees in the Rigging Department refused to work for approximately two hours in support of an asserted grievance that pipefitters could not dismantle and remove certain pipe coils without riggers being employed on the said work also.

"(f) On or about October 6 and 7, 1958, approximately 43 employees in the Cranes and Trucks Department refused to work for approximately eight hours in support of an asserted grievance concerning employment by the Company of an independent contractor to operate a contractor owned crane.

"(g) On or about November 19, 1958, approximately 71 employees refused to work for approximately 3¾ hours in the Boilermaking Department in support of an asserted grievance that burners and riggers would not dismantle a tank roof without employment of boilermakers at the said task.

"(h) On or about November 21, 1958, in further pursuance of the asserted grievance referred to in subparagraph (g) preceding, the main entrance to the plant was picketed and barricaded, thereby preventing approximately 800 employees from reporting for work for an entire shift.

"(i) On or about February 13 and 14, 1959, approximately 999 employees were induced to stop work over an asserted grievance on behalf of three riggers that they should not have been docked an aggregate of $2.19 in their pay for having reported late to work."

expresses the public policy upon which the specific anti-injunction provisions of the Act were based, contains language indicating that one primary concern of Congress was to insure workers the right "to exercise actual liberty of contract" and to protect "concerted activities for the purpose of collective bargaining." [11] From that premise, Sinclair argues that an interpretation of the term "labor dispute" so as to include a dispute arising out of a union's refusal to abide by the terms of a collective agreement to which it freely acceded is to apply the Norris-LaGuardia Act in a way that defeats one of the purposes for which it was enacted. But this argument, though forcefully urged both here and in much current commentary on this question,[12] rests more upon considerations of what many

[11] "In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted." 47 Stat. 70, 29 U. S. C. § 102.

[12] One of the most forthright arguments for judicial re-evaluation of the wisdom of the anti-injunction provisions of the Norris-LaGuardia Act and judicial rather than congressional revision of the meaning and scope of these provisions as applied to conduct in breach of a collec-

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commentators think would be the more desirable industrial and labor policy in view of their understanding as to the prevailing circumstances of contemporary labor-management relations than upon what is a correct judicial interpretation of the language of the Act as it was written by Congress.

In the first place, even the general policy declarations of § 2 of the Norris-LaGuardia Act, which are the foundation of this whole argument, do not support the conclusion urged. That section does not purport to limit the Act to the protection of collective bargaining but, instead, expressly recognizes the need of the anti-injunction provisions to insure the right of workers to engage in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" Moreover, the language of the specific provisions of the Act is so broad and inclusive that it leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself.[13]

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tive bargaining agreement is presented in Gregory, The Law of the Collective Agreement, 57 Mich. L. Rev. 635. That author, in urging that a strike in breach of a collective agreement should not now be held to involve or grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act, states: "After all, 1932 was a long time ago and conditions have changed drastically. Judges who still confuse violations of collective agreements with § 13 labor disputes and § 4 conduct have, in my opinion, lost contact with reality. The passage of time has operated as a function of many other types of judicial output at the highest level. I do not see why it should not do so in this instance, as well." *Id.*, at 645–646, n. 39. See also Stewart, No-Strike Clauses in the Federal Courts, 59 Mich. L. Rev. 673, especially at 683; Rice, A Paradox of our National Labor Law, 34 Marq. L. Rev. 233.

[13] Thus we conclude here precisely as we did in *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330: "We find nothing in the declarations of policy which narrows the definition of a labor dispute as found in the statutes. The rights of the parties and the jurisdiction of the federal courts are to be determined according to the express provisions applicable to labor disputes as so defined."

We cannot ignore the plain import of a congressional enactment, particularly one which, as we have repeatedly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction.[14]

Since we hold that the present case does grow out of a "labor dispute," the injunction sought here runs squarely counter to the proscription of injunctions against strikes contained in § 4 (a) of the Norris-LaGuardia Act, to the proscription of injunctions against peaceful picketing contained in § 4 (e) and to the proscription of injunctions prohibiting the advising of such activities contained in § 4 (i).[15] For these reasons, the Norris-LaGuardia Act deprives the courts of the United States of jurisdiction to enter that injunction unless, as is contended here, the scope of that Act has been so narrowed by the subsequent enactment of § 301 of the Taft-Hartley Act that it no longer prohibits even the injunctions specifically described in § 4 where such injunctions are sought as a remedy for breach of a collective bargaining agreement. Upon consideration, we cannot agree with that view and agree instead with the view expressed by the courts below and supported by the Courts of Appeals for the First and Second Circuits that § 301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act.[16]

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[14] *United States* v. *Hutcheson,* 312 U. S. 219, 234, and cases cited therein.

[15] See note 2, *supra.*

[16] We need not here again go into the history of the Norris-LaGuardia Act nor the abuses which brought it into being for that has been amply discussed on several occasions. See Frankfurter and Greene, The Labor Injunction. And see *e. g., United States* v. *Hutcheson,* 312 U. S. 219, 235–236; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91, 102–103. It is

The language of § 301 itself seems to us almost if not entirely conclusive of this question. It is especially significant that the section contains no language that could by any stretch of the imagination be interpreted to constitute an explicit repeal of the anti-injunction provisions of the Norris-LaGuardia Act in view of the fact that the section does expressly repeal another provision of the Norris-LaGuardia Act dealing with union responsibility for the acts of agents.[17] If Congress had intended that § 301 suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it certainly seems likely that it would have made its intent known in this same express manner. That is indeed precisely what Congress did do in § 101, amending § 10 (h) of the National Labor Relations Act, and § 208 (b) of the Taft-Hartley Act, by permitting injunctions to be obtained, not by private litigants, but only at the instance of the National Labor Relations Board and the Attorney Gen-

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sufficient here to note that the reasons which led to the passage of the Act were substantial and that the Act has been an important part of the pattern of legislation under which unions have functioned for nearly 30 years.

[17] Section 301 (e) of the Act, 61 Stat. 156, 29 U. S. C. § 185 (e), provides: "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This, of course, was designed to and did repeal for purposes of suits under § 301 the previously controlling provisions of § 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U. S. C. § 106: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

eral,[18] and in § 302 (e), by permitting private litigants to obtain injunctions in order to protect the integrity of employees' collective bargaining representatives in carrying out their responsibilities.[19] Thus the failure of Congress to include a provision in § 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable.

When the inquiry is carried beyond the language of § 301 into its legislative history, whatever small doubts as to the congressional purpose could have survived consideration of the bare language of the section should be wholly dissipated. For the legislative history of § 301 shows that Congress actually considered the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so.[20] The

[18] 61 Stat. 146, 155, as amended, 29 U. S. C. §§ 160 (h), 178 (b).

[19] 61 Stat. 157, 29 U. S. C. § 186 (e). That this section, which stands alone in expressly permitting suits for injunctions previously proscribed by the Norris-LaGuardia Act to be brought in the federal courts by private litigants under the Taft-Hartley Act, deals with an unusually sensitive and important problem is shown by the fact that § 186 makes the conduct so enjoinable a crime punishable by both fine and imprisonment.

[20] This fact was expressly recognized by the Court of Appeals for the Second Circuit in *A. H. Bull Steamship Co.* v. *Seafarers' International Union*, 250 F. 2d 326, 331–332. See also *W. L. Mead, Inc.*, v. *Teamsters Local No. 25*, 217 F. 2d 6, 9–10; Comment, Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia, 70 Yale L. J. 70, 97–99. Another commentator, though urging his own belief that a strike in breach of a collective agreement is not a "labor dispute" within the Norris-LaGuardia Act, nevertheless admits that Congress thought it was and deliberately

section as eventually enacted was the product of a conference between Committees of the House and Senate, selected to resolve the differences between conflicting provisions of the respective bills each had passed. Prior to this conference, the House bill had provided for federal jurisdiction of suits for breach of collective bargaining contracts and had expressly declared that the Norris-LaGuardia Act's anti-injunction provisions would not apply to such suits.[21] The bill passed by the Senate, like the House bill, granted federal courts jurisdiction over suits for breach of such agreements but it did not, like the House bill, make the Norris-LaGuardia Act's prohibition against injunctions inapplicable to such suits.[22] Instead it made breach of a collective agreement an unfair labor practice.[23] Under the Senate version, therefore, a breach

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decided to leave the anti-injunction provisions of that Act applicable to § 301 suits. See Rice, A Paradox of our National Labor Law, 34 Marq. L. Rev. 233, 235.

[21] H. R. 3020, 80th Cong., 1st Sess., as it passed the House, provided:

"SEC. 302. (a) Any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such agreement affects commerce, or the court otherwise has jurisdiction of the cause.

. . . . .

"(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes,' shall not have any application in respect of either party." I Legislative History of the Labor Management Relations Act, 1947, 221–222.

[22] This is true both of the original Senate bill, S. 1126, as reported and of the amended House bill, H. R. 3020, as passed by the Senate. I Leg. Hist. 151–152; I Leg. Hist. 279–280.

[23] I Leg. Hist. 111–112, 114, 239, 241–242.

of a collective bargaining agreement, like any unfair labor practice, could have been enjoined by a suit brought by the National Labor Relations Board,[24] but no provision of the Senate version would have permitted the issuance of an injunction in a labor dispute at the suit of a private party. At the conference the provision of the House bill expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act, as well as the provision of the bill passed by the Senate declaring the breach of a collective agreement to be an unfair labor practice, was dropped and never became law. Instead, the conferees, as indicated by the provision which came out of the conference and eventually became § 301, agreed that suits for breach of such agreements should remain wholly private and "be left to the usual processes of the law" [25] and that, in view of the fact that these suits would be at the instance of private parties rather than at the instance of the Labor Board, no change in the existing anti-injunction provisions of the Norris-LaGuardia Act should be made. The House Conference Report expressly recognized that the House provision for repeal in contract actions of the anti-injunction prohibitions of the Norris-LaGuardia Act had been eliminated in Conference:

> "Section 302 (e) of the House bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization

[24] In such a situation, suit for injunction could be brought by the Board and, by virtue of § 10 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 146, 29 U. S. C. § 160 (h), the Norris-LaGuardia Act would not apply.

[25] H. R. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., pp. 41–42, I Leg. Hist. 545–546.

> participating or interested in a labor dispute shall be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House bill. Section 301 (e) of the conference agreement provides that for the purposes of section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." [26]

And Senator Taft, Chairman of the Conference Committee and one of the authors of this legislation that bore his name, was no less explicit in explaining the results of the Conference to the Senate: "The conferees . . . rejected the repeal of the Norris-LaGuardia Act." [27]

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[26] H. R. Conf. Rep. No. 510, on H. R. 3020, 80th Cong., 1st Sess., p. 66, I Leg. Hist. 570.

[27] 93 Cong. Rec. 6445–6446, II Leg. Hist. 1544. Immediately prior to this remark, Senator Taft had inserted into the Record a written summary of his understanding as to the effect of the conference upon the bill passed by the Senate: "When the bill passed the Senate it also contained a sixth paragraph in this subsection [8 (a)] which made it an unfair labor practice for an employer to violate the terms of a collective-bargaining agreement or the terms of an agreement to submit a labor dispute to arbitration. The House conferees objected to this provision on the ground that it would have the effect of making the terms of every collective agreement subject to interpretation and determination by the Board, rather than by the courts. The Senate conferees ultimately agreed to its elimination as well as the deletion of a similar provision contained in subsection 8 (b) (5) of the Senate amendment which made it an unfair labor practice for a labor organization to violate the terms of collective-bargaining agreements. The provisions of the Senate amendment *which conferred a right of action for damages* upon a party aggrieved by breach of a collective-

We cannot accept the startling argument made here that even though Congress did not itself want to repeal the Norris-LaGuardia Act, it was willing to confer a power upon the courts to "accommodate" that Act out of existence whenever they might find it expedient to do so in furtherance of some policy they had fashioned under § 301. The unequivocal statements in the House Conference Report and by Senator Taft on the floor of the Senate could only have been accepted by the Congressmen and Senators who read or heard them as assurances that they could vote in favor of § 301 without altering, reducing or impairing in any manner the anti-injunction provisions of the Norris-LaGuardia Act. This is particularly true of the statement of Senator Taft, a man generally regarded in the Senate as a very able lawyer and one upon whom the Senate could rely for accurate, forthright explanations of legislation with which he was connected. Senator Taft was of course entirely familiar with the prohibitions of the Norris-LaGuardia Act and the impact those prohibitions would have upon the enforcement under § 301 of all related contractual provisions, including contractual provisions dealing with arbitration. If, as this argument suggests, the intention of Congress in enacting § 301 was to clear the way for judicial obliteration of that Act under the soft euphemism of "accommodation," Senator Taft's flat statement that the Conference had rejected the repeal of the Norris-LaGuardia Act could only be regarded as disingenuous. We cannot impute any such intention to him.

Moreover, we think that the idea that § 301 sanctions piecemeal judicial repeal of the Norris-LaGuardia Act requires acceptance of a wholly unrealistic view of the manner in which Congress handles its business. The

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bargaining contract, however, were retained in the conference agreement (section 301)." 93 Cong. Rec. 6443, II Leg. Hist. 1539. (Emphasis supplied.)

question of whether existing statutes should be continued in force or repealed is, under our system of government, one which is wholly within the domain of Congress. When the repeal of a highly significant law is urged upon that body and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision. This is especially so where the fact of the controversy over repeal and the resolution of that controversy in Congress plainly appears in the formal legislative history of its proceedings.[28] Indeed, not a single instance has been called to our attention in which a carefully considered and rejected proposal for repeal has been revived and adopted by this Court under the guise of "accommodation" or any other pseudonym.

Nor have we found anything else in the previous decisions of this Court that would indicate that we should disregard all this overwhelming evidence of a congressional intent to retain completely intact the anti-injunction prohibitions of the Norris-LaGuardia Act in suits brought under § 301. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*,[29] upon which Sinclair places

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[28] The legislative history of the Taft-Hartley Act shows that Congress actually considered and relied upon this normal functioning of the judicial power as insuring that no unintended repeal of the anti-injunction provisions of the Norris-LaGuardia Act would be declared. Thus Senator Taft, when pressed by Senator Morse with regard to the possibility that a provision inserted in § 303 (a) declaring secondary boycotts unlawful might be held to justify an injunction previously forbidden by the Norris-LaGuardia Act, stated: "Let me say in reply to the Senator or anyone else who makes the same argument, that that is not the intention of the author of the amendment. It is not his belief as to the effect of it. It is not the advice of counsel to the committee. Under those circumstances, I do not believe that any court would construe the amendment along the lines suggested by the Senator from Oregon." 93 Cong. Rec. 4872, II Leg. Hist. 1396.

[29] 353 U. S. 30.

its primary reliance, is distinguishable on several grounds. There we were dealing with a strike called by the union in defiance of an affirmative duty, imposed upon the union by the Railway Labor Act itself, compelling unions to settle disputes as to the interpretation of an existing collective bargaining agreement, not by collective union pressures on the railroad but by submitting them to the Railroad Adjustment Board as the exclusive means of final determination of such "minor" disputes.[30] Here, on the other hand, we are dealing with a suit under a quite different law which does not itself compel a particular, exclusive method for settling disputes nor impose any requirement, either upon unions or employers, or upon the courts, that is in any way inconsistent with a continuation of the Norris-LaGuardia Act's proscription of federal labor injunctions against strikes and peaceful picketing. In addition, in *Chicago River* we were dealing with a statute that had a far different legislative history than the one now before us. Thus there was no indication in the legislative history of the Railway Labor Act, as there is in the history of § 301, that Congress had, after full debate and careful consideration by both Houses and in Joint Conference, specifically rejected proposals to make the prohibitions of the Norris-LaGuardia Act inapplicable. Indeed, the Court was able to conclude in *Chicago River* "that there was general understanding between both the supporters and the opponents of the 1934 amendment that the provisions dealing with the Adjustment Board were to be considered as compulsory arbitration in this limited field." [31] And certainly no one could

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[30] The Court in *Chicago River* expressly recognized and rested its decision upon the differences between provisions for the settlement of disputes under the Railway Labor Act and the Taft-Hartley Act. *Id.*, at 31–32, n. 2. See also *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.*, 362 U. S. 330, 338–340.

[31] 353 U. S. 30, at 39.

contend that § 301 was intended to set up any such system of "compulsory arbitration" as the exclusive method for settling grievances under the Taft-Hartley Act.

Textile Workers Union v. *Lincoln Mills*,[32] upon which some lesser reliance is placed, is equally distinguishable. There the Court held merely that it did not violate the anti-injunction provisions of the Norris-LaGuardia Act to compel the parties to a collective bargaining agreement to submit a dispute which had arisen under that agreement to arbitration where the agreement itself required arbitration of the dispute. In upholding the jurisdiction of the federal courts to issue such an order against a challenge based upon the Norris-LaGuardia Act, the Court pointed out that the equitable relief granted in that case—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of United States courts.[33] An injunction against work stoppages, peaceful picketing or the nonfraudulent encouraging of those activities would, however, prohibit the precise kinds of conduct which subsections (a), (e) and (i) of § 4 of the Norris-LaGuardia Act unequivocally say cannot be prohibited.[34]

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[32] 353 U. S. 448.

[33] *Id.*, at 458. See also *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.*, 362 U. S. 330, 338–339, where *Lincoln Mills* and other cases not involving an injunction against activity protected by § 4 of the Norris-LaGuardia Act were distinguished on this ground.

[34] An injunction against a strike or peaceful picketing in breach of a collective agreement "would require strong judicial creativity in the face of the plain meaning of Section 4," Cox, Current Problems in the Law of Grievance Arbitration, 30 Rocky Mt. L. Rev. 247, 256, for, indeed, such an injunction "would fly in the face of the plain words of Section 4 of the Norris-LaGuardia Act, the historical purpose of which was to make peaceful concerted activities unenjoinable without regard to the nature of the labor dispute." *Id.*, at 253.

Nor can we agree with the argument made in this Court that the decision in *Lincoln Mills*, as implemented by the subsequent decisions in *United Steelworkers* v. *American Manufacturing Co.*,[35] *United Steelworkers* v. *Warrior & Gulf Navigation Co.*,[36] and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*,[37] requires us to reconsider and overrule the action of Congress in refusing to repeal or modify the controlling commands of the Norris-LaGuardia Act. To the extent that those cases relied upon the proposition that the arbitration process is "a kingpin of federal labor policy," we think that proposition was founded not upon the policy predilections of this Court but upon what Congress said and did when it enacted § 301. Certainly we cannot accept any suggestion which would undermine those cases by implying that the Court went beyond its proper power and itself "forged . . . a kingpin of federal labor policy" inconsistent with that section and its purpose. Consequently, we do not see how cases implementing the purpose of § 301 can be said to have freed this Court from its duty to give effect to the plainly expressed congressional purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act. The argument to the contrary seems to rest upon the notion that injunctions against peaceful strikes are necessary to make the arbitration process effective. But whatever might be said about the merits of this argument, Congress has itself rejected it. In doing so, it set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration and it is not this Court's business to review the wisdom of that decision.

The plain fact is that § 301, as passed by Congress, presents no conflict at all with the anti-injunction provisions of the Norris-LaGuardia Act. Obedience to the congres-

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[35] 363 U. S. 564. [36] 363 U. S. 574. [37] 363 U. S. 593.

sional commands of the Norris-LaGuardia Act does not directly affect the "congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes" [38] at all for it does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement. At the most, what is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement. And as we have already pointed out, Congress was not willing to insure that enjoyment to an employer at the cost of putting the federal courts back into the business of enjoining strikes and other related peaceful union activities.

It is doubtless true, as argued, that the right to sue which § 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements. Strong arguments are made to us that it is highly desirable that the Norris-LaGuardia Act be changed in the public interest. If that is so, Congress itself might see fit to change that law and repeal the anti-injunction provisions of the Act insofar as suits for violation of collective agreements are concerned, as the House bill under consideration originally provided. It might, on the other hand, decide that if injunctions are necessary, the whole idea of enforcement of these agreements by private suits should be discarded in favor of enforcement through the administrative machinery of the Labor Board, as Senator Taft provided in his Senate bill. Or it might decide that neither of these methods is entirely satisfactory and turn instead to a completely new approach. The question of what

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[38] *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, at 458–459.

change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress—it is a question for lawmakers, not law interpreters. Our task is the more limited one of interpreting the law as it now stands. In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent.[39]

The District Court was correct in dismissing Count 3 of petitioner's complaint for lack of jurisdiction under the Norris-LaGuardia Act. The judgment of the Court of Appeals affirming that order is therefore

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN join, dissenting.

I believe that the Court has reached the wrong result because it has answered only the first of the questions which must be answered to decide this case. Of course § 301 of the Taft-Hartley Act did not, for purposes of

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[39] We have not ignored Sinclair's argument that to apply the Norris-LaGuardia Act here would deprive it of its constitutional right to equal protection of the law, both because of an allegedly unlawful discrimination between Taft-Hartley Act employers and Railway Labor Act employers by virtue of the decision in *Chicago River*, and because of an allegedly unlawful discrimination between Taft-Hartley Act employers and unions by virtue of the decision in *Lincoln Mills*. We deem it sufficient to say that we do not find either of these arguments compelling.

actions brought under it, "repeal" § 4 of the Norris-LaGuardia Act. But the two provisions do coexist, and it is clear beyond dispute that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both. Since such accommodation is possible, the Court's failure to follow that path leads it to a result—not justified by either the language or history of § 301—which is wholly at odds with our earlier handling of directly analogous situations and which cannot be woven intelligibly into the broader fabric of related decisions.

I.

Section 301 of the Taft-Hartley Act, enacted in 1947, authorizes Federal District Courts to entertain "[s]uits for violation of contracts between an employer and a labor organization . . . ." It does not in terms address itself to the question of remedies. As we have construed § 301, it casts upon the District Courts a special responsibility to carry out contractual schemes for arbitration, by holding parties to that favored process for settlement when it has been contracted for, and by then regarding its result as conclusive.[1] At the same time, § 4 of the Norris-LaGuardia Act, enacted in 1932, proscribes the issuance by federal courts of injunctions against various concerted activities "in any case involving or growing out of any labor dispute." But the enjoining of a strike over an arbitrable grievance may be indispensable to the effective enforcement of an arbitration scheme in a collective agreement; thus the power to grant that injunctive remedy may be essential to the uncrippled performance of the Court's

[1] *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564; *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574; *Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593.

function under § 301.[2] Therefore, to hold that § 301 did not repeal § 4 is only a beginning. Having so held, the Court should—but does not—go on to consider how it is to deal with the surface conflict between the two statutory commands.

The Court has long acted upon the premise that the Norris-LaGuardia Act does not stand in isolation. It is one of several statutes which, taken together, shape the national labor policy. Accordingly, the Court has recognized that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws. See *Brotherhood of Railroad Trainmen* v. *Chicago River R. Co.*, 353 U. S. 30; *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U. S. 232; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 562–563. In *Chicago River* we insisted that there "must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved." [3]

These decisions refusing inflexible application of Norris-LaGuardia point to the necessity of a careful inquiry whether the surface conflict between § 301 and § 4 is irreconcilable in the setting before us: a strike over a

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[2] In *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, we held that a strike over a dispute which a contract provides shall be settled exclusively by binding arbitration is a breach of contract despite the absence of a no-strike clause, saying, at p. 105: "To hold otherwise would obviously do violence to accepted principles of traditional contract law. Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." And in *Brotherhood of Railroad Trainmen* v. *Chicago River R. Co.*, 353 U. S. 30, 39, we recognized that allowing a strike over an arbitrable dispute would effectively "defeat the jurisdiction" of the arbitrator.

[3] 353 U. S., at 40.

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grievance which both parties have agreed to settle by binding arbitration. I think that there is nothing in either the language of § 301 or its history to prevent § 4's here being accommodated with it, just as § 4 was accommodated with the Railway Labor Act.

II.

It cannot be denied that the availability of the injunctive remedy in this setting is far more necessary to the accomplishment of the purposes of § 301 than it would be detrimental to those of Norris-LaGuardia. *Chicago River* makes this plain. We there held that the federal courts, notwithstanding Norris-LaGuardia, may enjoin strikes over disputes as to the interpretation of an existing collective agreement, since such strikes flout the duty imposed on the union by the Railway Labor Act to settle such "minor disputes" by submission to the National Railroad Adjustment Board rather than by concerted economic pressures. We so held, even though the Railway Labor Act contains no express prohibition of strikes over "minor disputes," because we found it essential to the meaningful enforcement of that Act—and because the existence of mandatory arbitration eliminated one of the problems to which Norris-LaGuardia was chiefly addressed, namely, that "the injunction strips labor of its primary weapon without substituting any reasonable alternative." [4]

That reasoning is applicable with equal force to an injunction under § 301 to enforce a union's contractual duty, also binding on the employer, to submit certain disputes to terminal arbitration and to refrain from striking over them. The federal law embodied in § 301 stresses the effective enforcement of such arbitra-

[4] *Id.*, at 41.

tion agreements. When one of them is about to be sabotaged by a strike, § 301 has as strong a claim upon an accommodating interpretation of § 4 as does the compulsory arbitration law of the Railway Labor Act. It is equally true in both cases that "[an injunction] alone can effectively guard the plaintiff's right," *Machinists* v. *Street,* 367 U. S. 740, 773. It is equally true in both cases that the employer's specifically enforceable obligation to arbitrate provides a "reasonable alternative" to the strike weapon. It is equally true in both cases that a major contributing cause for the enactment of Norris-LaGuardia—the at-largeness of federal judges in enjoining activities thought to seek "unlawful ends" or to constitute "unlawful means" [5]—is not involved. Indeed, there is in this case a factor weighing in favor of the issuance of an injunction which was not present in *Chicago River:* [6] the express contractual commitment of the union to refrain from striking, viewed in light of the overriding purpose of § 301 to assist the enforcement of collective agreements.

In any event, I should have thought that the question was settled by *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448. In that case, the Court held that the procedural requirements of Norris-LaGuardia's § 7, although in terms fully applicable, would not apply so as to frustrate a federal court's effective enforcement under § 301 of an employer's obligation to arbitrate. It is strange, I think, that § 7 of the Norris-LaGuardia Act need not be read, in the face of § 301, to impose inapt procedural restrictions upon the specific enforcement of an employer's

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[5] See, *e. g.,* S. Rep. No. 163, 72d Cong., 1st Sess., p. 18; Frankfurter and Greene, The Labor Injunction, pp. 24–46, 200, 202.

[6] It is worth repeating that the Railway Labor Act incorporates no express prohibition of strikes over "minor disputes."

contractual duty to arbitrate; but that § 4 must be read, despite § 301, to preclude absolutely the issuance of an injunction against a strike which ignores a union's identical duty.

III.

The legislative history of § 301 affords the Court no refuge from the compelling effect of our prior decisions. That history shows that Congress considered and rejected "the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned . . . ."[7] But congressional rejection of outright repeal certainly does not imply hostility to an attempt by the courts to accommodate all statutes pertinent to the decision of cases before them. Again, the Court's conclusion stems from putting the wrong question. When it is appreciated that there is no question here of "repeal," but rather one of how the Court is to apply the whole statutory complex to the case before it, it becomes clear that the legislative history does not support the Court's conclusion. First, however, it seems appropriate to discuss, as the Court has done, the language of § 301 considered in light of other provisions of the statute.

There is nothing in the words of § 301 which so much as intimates any limitation to damage remedies when the asserted breach of contract consists of concerted activity. The section simply authorizes the District Courts to entertain and decide suits for violation of collective contracts. Taking the language alone, the irresistible implication would be that the District Courts were to employ their regular arsenal of remedies appropriately to the situation. That would mean, of course, that injunctive relief could be afforded when damages would not be an adequate remedy. This much, surely, is settled by *Lin-*

[7] *Ante*, p. 205.

coln Mills. But the Court reasons that the failure of § 301 explicitly to repeal § 4 of Norris-LaGuardia completely negates the availability of injunctive relief in any case where that provision—in the absence of § 301—would apply. That reasoning stems from attaching undue significance to the fact that express repeal of Norris-LaGuardia provisions may be found in certain other sections of the Taft-Hartley Act—from which the Court concludes "not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them *in situations where such repeal seemed desirable.*" [8] Even on this analysis the most that can be deduced from such a comparative reading is that while repeal of Norris-LaGuardia seemed desirable to Congress in certain other contexts, repeal did not seem desirable in connection with § 301.

Sound reasons explain why repeal of Norris-LaGuardia provisions, acceptable in other settings, might have been found ill-suited for the purpose of § 301. And those reasons fall far short of a design to preclude absolutely the issuance under § 301 of any injunction against an activity included in § 4 of Norris-LaGuardia. Section 10 (h) of the Act [9] simply lifts the § 4 barrier in connection with proceedings brought by the National Labor Relations Board—in the Courts of Appeals for enforcement of Board cease-and-desist orders against unfair labor practices, and in the District Courts for interlocutory relief against activities being prosecuted before the Board as unfair labor practices. This repeal in aid of government litigation to enforce carefully drafted prohibitions already in the Act as unfair labor practices was, obviously, entirely

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[8] *Ante*, p. 205. (Emphasis added.)

[9] National Labor Relations Act, § 10 (h), 61 Stat. 149, 29 U. S. C. § 160 (h).

appropriate, definitely limited in scope, predictable in effect, and devoid of any risk of abuse or misunderstanding. Much the same is true of § 208 (b) of Taft-Hartley,[10] which simply repeals Norris-LaGuardia in a case where the Attorney General seeks an injunction at the direction of the President, who must be of the opinion—after having been advised by a board of inquiry—that continuation of the strike in question would imperil the national health and safety.

Only in § 302 (e) of Taft-Hartley[11] is there found a repeal of Norris-LaGuardia's anti-injunction provisions in favor of a suit by a private litigant.[12] The District Courts are there authorized to restrain the payment by employers and the acceptance by employee representatives of unauthorized payments in the nature of bribes. Not only is the problem thus dealt with "unusually sensitive and important," as the Court notes,[13] but the repeal of Norris-LaGuardia is clearly, predictably, and narrowly confined to one kind of suit over one kind of injury; and obviously it presents no possible threat to the important purposes of that Act.

How different was the problem posed by § 301, which broadly authorized District Courts to decide suits for breach of contract. The Congress understandably may not have felt able to predict what provisions would crop up in collective bargaining agreements, to foresee the settings in which these would become subjects of litiga-

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[10] 61 Stat. 155, 29 U. S. C. § 178.

[11] 61 Stat. 158, 29 U. S. C. § 186 (e).

[12] Section 301 (e), 61 Stat. 157, 29 U. S. C. § 185 (e), also mentioned by the Court, has no bearing on injunction problems. It repeals, for its purposes, § 6 of the Norris-LaGuardia Act, which deals with agency responsibility for concerted activities. Its only relevance here is in showing what is clear anyway: That § 301 effected no repeal of the anti-injunction provisions of Norris-LaGuardia.

[13] *Ante*, p. 205, n. 19.

tion, or to forecast the rules of law which the courts would apply. The consequences of repealing the anti-injunction provisions in this context would have been completely unknowable, and outright repeal, therefore, might well have seemed unthinkable. Congress, clearly, had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits; but it does not follow that § 301 is not the equal of § 4 in cases which implicate both provisions.

Indeed, it might with as much force be said that Congress knew well how to limit remedies against employee activities to damages when that was what it intended, as that Congress knew how to repeal Norris-LaGuardia when *that* was what it intended. Section 303 of Taft-Hartley [14] authorizes private actions *for damages* resulting from certain concerted employee activities. When that section was introduced on the Senate floor, it provided for injunctive relief as well. Extended debate revealed strong sentiment against the injunction feature, which incorporated a repeal of Norris-LaGuardia. The section's supporters, therefore, proposed a different version which provided for damages only. In this form, the section was adopted by the Senate—and later by the Conference and the House.[15] Certainly, after this experience Congress would have used language confining § 301 to damage remedies when it was invoked against concerted activity, if such had been the intention.

The statutory language thus fails to support the Court's position. The inference is at least as strong that Congress was content to rely upon the courts to resolve any seeming conflicts between § 301 and § 4 as they arose in the relatively manageable setting of particular cases, as that Congress intended to limit to damages the reme-

[14] 29 U. S. C. § 187.

[15] See II Leg. Hist. 1323–1400; I Leg. Hist. 571.

dies courts could afford against concerted activities under § 301. The Court then should so exercise its judgment as best to effect the most important purposes of each statute. It should not be bound by inscrutable congressional silence to a wooden preference for one statute over the other.

Nor does the legislative history of § 301 suggest any different conclusion. As the Court notes, the House version would have repealed Norris-LaGuardia in suits brought under the new section.[16] The Senate version of § 301, like the section as enacted, did not deal with Norris-LaGuardia, but neither did it limit the remedies available against concerted activity.[17] Thus any attempt to ascertain the Senate's intention would face the same choices as those I have suggested in dealing with the language of § 301 as finally enacted. It follows that to construe the Conference Committee's elimination of the House repeal as leaving open the possibility of judicial accommodation is at least as reasonable as to conclude that Congress, by its silence, was directing the courts to disregard § 301 whenever opposition from § 4 was encountered.[18]

I emphasize that the question in this case is not whether the basic policy embodied in Norris-LaGuardia against the injunction of activities of labor unions has been abandoned in actions under § 301; the question is simply whether injunctions are barred against strikes over griev-

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[16] I Leg. Hist. 221–222.

[17] I Leg. Hist. 279–280.

[18] There is nothing in any Committee Report, or in any floor debate, which even intimates a confinement of § 301 remedies to damages in cases involving concerted activities. The only bit of legislative history which could is the statement of Senator Taft, quoted by the Court at note 27 of its opinion, which he inserted into the Congressional Record. What little significance that isolated insertion might have had has, of course, been laid to rest by *Lincoln Mills*.

ances which have been routed to arbitration by a contract specifically enforceable against both the union and the employer. Enforced adherence to such arbitration commitments has emerged as a dominant motif in the developing federal law of collective bargaining agreements. But there is no general federal anti-strike policy; and although a suit may be brought under § 301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail. Insistence upon strict application of Norris-LaGuardia to a strike over a dispute which both parties are bound by contract to arbitrate threatens a leading policy of our labor relations law. But there may be no such threat if the union has made no binding agreement to arbitrate; and if the employer cannot be compelled to arbitrate, restraining the strike would cut deep into the core of Norris-LaGuardia. Therefore, unless both parties are so bound, limiting an employer's remedy to damages might well be appropriate. The susceptibility of particular concrete situations to this sort of analysis shows that rejection of an outright repeal of § 4 was wholly consistent with acceptance of a technique of accommodation which would lead, in some cases, to the granting of injunctions against concerted activity. Accommodation requires only that the anti-injunction policy of Norris-LaGuardia not intrude into areas, not vital to its ends, where injunctive relief is vital to a purpose of § 301; it does not require unconditional surrender.

IV.

Today's decision cannot be fitted harmoniously into the pattern of prior decisions on analogous and related matters. Considered in their light, the decision leads inescapably to results consistent neither with any imaginable legislative purpose nor with sound judicial administration.

We have held that uniform doctrines of federal labor law are to be fashioned judicially in suits brought under § 301, *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; that actions based on collective agreements remain cognizable in state as well as federal courts, *Dowd Box Co.* v. *Courtney*, 368 U. S. 502; and that state courts must apply federal law in such actions, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95.

The question arises whether today's prohibition of injunctive relief is to be carried over to state courts as a part of the federal law governing collective agreements. If so, § 301, a provision plainly designed to *enhance* the responsibility of unions to their contracts, will have had the opposite effect of depriving employers of a state remedy they enjoyed prior to its enactment.

On the other hand if, as today's literal reading suggests [19] and as a leading state decision holds,[20] States remain free to apply their injunctive remedies against concerted activities in breach of contract, the development of a uniform body of federal contract law is in for hard times. So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be the preferred instruments to protect the integrity of the arbitration process, which *Lincoln Mills* and the *Steelworkers* decisions forged into a kingpin of federal labor policy. Enunciation of uniform doctrines applicable in such cases will be severely impeded. Moreover, the type of relief available in a particular instance will turn on fortuities

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[19] Section 4 commences: "No court of the United States shall have jurisdiction to issue any restraining order . . . ."

[20] *McCarroll* v. *Los Angeles County District Council*, 49 Cal. 2d 45, 315 P. 2d 322.

of locale and susceptibility to process—depending upon which States have anti-injunction statutes and how they construe them.

I have not overlooked the possibility that removal of the state suit to the federal court might provide the answer to these difficulties. But if § 4 is to be read literally, removal will not be allowed.[21] And if it is allowed, the result once again is that § 301 will have had the strange consequence of taking away a contract remedy available before its enactment.

V.

The decision deals a crippling blow to the cause of grievance arbitration itself. Arbitration is so highly regarded as a proved technique for industrial peace that even the Norris-LaGuardia Act fosters its use.[22] But since unions cannot be enjoined by a federal court from striking in open defiance of their undertakings to arbitrate, employers will pause long before committing themselves to obligations enforceable against them but not against their unions. The Court does not deny the desirability, indeed, necessity, for injunctive relief against a strike over an arbitrable grievance.[23] The Court says only that federal courts may not grant such relief, that Congress must amend § 4 if those courts are to give substance to the congressional plan of encouraging peaceable settlements of grievances through arbitration.

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[21] Compare note 19, *supra*, with the language of the removal statute, 28 U. S. C. § 1441, allowing removal in cases "of which the district courts of the United States have original jurisdiction."

[22] See Norris-LaGuardia Act, § 8, 47 Stat. 72, 29 U. S. C. § 108.

[23] The Court acknowledges, of course, that an employer may obtain an order directing a union to comply with its contract to arbitrate. Consistently with what we said in *Lucas, supra*, note 2, a strike in the face of such an order would risk a charge of contempt.

VI.

A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.

In the case before us, the union enjoys the contractual right to make the employer submit to final and binding arbitration of any employee grievance. At the same time, the union agrees that "[T]here shall be no strikes . . . for any cause which is or may be the subject of a grievance." [24] The complaint alleged that the union had, over the past several months, repeatedly engaged in "quickie" strikes over arbitrable grievances. Under the contract and the complaint, then, the District Court might conclude that there have occurred and will continue to occur breaches of contract of a type to which the principle of accommodation applies. It follows that rather than dismissing the complaint's request for an injunction, the

[24] See *Atkinson* v. *Sinclair Rfg. Co.*, decided this day, *post*, p. 238.

Court should remand the case to the District Court with directions to consider whether to grant the relief sought—an injunction against future repetitions. This would entail a weighing of the employer's need for such an injunction against the harm that might be inflicted upon legitimate employee activity. It would call into question the feasibility of setting up *in futuro* contempt sanctions against the union (for striking) and against the employer (for refusing to arbitrate) in regard to prospective disputes which might fall more or less clearly into the adjudicated category of arbitrable grievances. In short, the District Court will have to consider with great care whether it is possible to draft a decree which would deal equitably with all the interests at stake.

I would reverse the Court of Appeals and remand to the District Court for further proceedings consistent with this dissenting opinion.

IN RE McCONNELL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 498. Argued April 10, 1962.—Decided June 18, 1962.

Under 18 U. S. C. § 401 and Federal Rule of Criminal Procedure 42 (a), petitioner was summarily tried and convicted by the trial judge of criminal contempt for conduct during a trial in which petitioner represented the plaintiff in a suit under the Clayton Act for treble damages for an alleged conspiracy to destroy the plaintiff's business by restraining and monopolizing trade. At the very outset of the trial, the judge had ruled erroneously that the plaintiff's counsel could not try to prove the conspiracy charge; but, in order to comply with Federal Rule of Civil Procedure 43 (c) and thus preserve his client's rights on appeal, petitioner in the presence of the jury persisted in asking questions intended to lay the proper foundation for offers of proof of conspiracy. The judge ordered petitioner to stop doing so; but petitioner insisted that he had a right to do so and said he would continue to do so "unless some bailiff stops us." However, a recess was then called and thereafter petitioner asked no more of the forbidden questions. *Held:* There was nothing in this conduct sufficiently disruptive of the trial court's business to "obstruct the administration of justice," within the meaning of 18 U. S. C. § 401, and a judgment sustaining the conviction is reversed. Pp. 230–236.

294 F. 2d 310, reversed.

Thomas C. McConnell, petitioner, argued the cause and filed briefs *pro se.*

Philip R. Monahan argued the cause for the United States. With him on the brief were *Solicitor General Cox* and *Assistant Attorney General Miller.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner Thomas C. McConnell, a lawyer, was summarily found guilty of contempt of court for statements made while representing the Parmelee Transportation Company in an antitrust suit for treble damages

and an injunction. The complaint charged that a number of defendants had unlawfully conspired to destroy Parmelee's business by restraining and monopolizing trade in violation of the Sherman Act.[1] Petitioner and his co-counsel, Lee A. Freeman, had done extensive pretrial preparation on the issue of conspiracy which was the heart of their case. At the very outset of the trial, however, the district judge on his own motion refused to permit counsel to try to prove their conspiracy charge, holding that they must first prove in a wholly separate trial that defendants' actions had resulted in an economic injury to the public—an erroneous holding since we have held that the right of recovery of a plaintiff in a treble damage antitrust case does not depend at all on proving an economic injury to the public.[2]

Cut off by the judge's erroneous ruling from trial of the basic issue of conspiracy and wishing to provide a record which would allow this ruling to be reviewed by the Court of Appeals, counsel for Parmelee asked counsel for defendants to stipulate that plaintiff would have introduced certain evidence of conspiracy had it been allowed to do so. Defense counsel refused to stipulate, however, insisting that Parmelee's counsel prepare their record by following the procedure set out in Rule 43 (c) of the Federal Rules of Civil Procedure, which requires that before an offer of proof is made questions upon which the offer is based must first be asked in the presence of the jury.[3]

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[1] This action was brought under the Clayton Act, §§ 4 and 16, 38 Stat. 731, 737, 15 U. S. C. §§ 15, 26, and charged violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2.

[2] *Radiant Burners, Inc.*, v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656, 660; *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207. See aso *Radovich* v. *National Football League*, 352 U. S. 445.

[3] Rule 43 (c) provides in part:

"In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attor-

Unwilling to risk dismissal of their appeal for failure to follow Rule 43 (c), Parmelee's counsel proceeded to produce and question witnesses in the presence of the jury in order to lay the proper foundation for their offers of proof of conspiracy. But during the process of this questioning the judge ordered it stopped and directed that any further offers of proof be made without first having asked questions of witnesses in the presence of the jury. This ruling placed Parmelee's counsel in quite a dilemma because defense counsel was still insisting that all offers of proof be made in strict compliance with Rule 43 (c) and there was no way of knowing with certainty whether the Court of Appeals would treat the trial court's order to dispense with questions before the jury as an excuse for failure to comply with the Rule. Petitioner therefore not only sought to make clear to the court that he thought defense counsel's objection was "right" [4] but also repeatedly insisted that he be allowed to make his offers of proof in compliance with the Rule.[5] Following the trial the judge charged petitioner and his co-counsel Freeman in a number of specifications with being guilty of contemp-

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ney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. . . ."

[4] Since our disposition of this case does not turn on whether petitioner was correct in thinking that Rule 43 (c) absolutely requires that all offers of proof in jury trials be based on questions before the jury, we express no opinion on that question.

[5] The district judge did not change his ruling and ultimately gave judgment for defendants on the grounds that plaintiff had not proved public economic injury and that the facts alleged in the complaint and the proof offered at the trial did not constitute a violation of the antitrust laws. 186 F. Supp. 533. The Court of Appeals for the Seventh Circuit affirmed the decision on this latter ground. 292 F. 2d 794.

tuous conduct during the course of the trial. After separate hearings both lawyers were summarily found guilty by the trial judge on all specifications. Both appealed to the Court of Appeals, which reversed all of Freeman's convictions,[6] reversed two of petitioner McConnell's convictions, but, with Judge Duffy dissenting, sustained the conviction of petitioner on Specification 6—the specification based on petitioner's insistence that he be allowed to make offers of proof in compliance with Rule 43 (c).[7] Even as to this conviction, however, the Court of Appeals held that the jail sentence imposed by the trial judge should be reduced to a fine of $100. As in *Offutt* v. *United States*,[8] the "importance of assuring alert self-restraint in the exercise by district judges of the summary power for punishing contempt" prompted us to bring the case here.[9]

The statute under which petitioner was summarily convicted of contempt is 18 U. S. C. § 401, which provides that:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . . ."

This section is based on an Act passed in 1831 [10] in order to correct serious abuses of the summary contempt power that had grown up and was intended as a "drastic delimitation . . . of the broad undefined power of the inferior federal courts under the Act of 1789," [11] revealing "a Con-

[6] 292 F. 2d 806.

[7] 294 F. 2d 310.

[8] 348 U. S. 11, 13.

[9] 368 U. S. 936.

[10] 4 Stat. 487. The present wording of § 401 comes from the 1948 revision and codification of Title 18. 62 Stat. 701.

[11] *Nye* v. *United States*, 313 U. S. 33, 45.

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gressional intent to safeguard Constitutional procedures by limiting courts, as Congress is limited in contempt cases, to 'the least possible power adequate to the end proposed.' " [12] "The exercise by federal courts of any broader contempt power than this," we have said, "would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury." [13] And we held long ago, in *Ex parte Hudgings*,[14] that while this statute undoubtedly shows a purpose to give courts summary powers to protect the administration of justice against immediate interruption of court business, it also means that before the drastic procedures of the summary contempt power may be invoked to replace the protections of ordinary constitutional procedures there must be an actual obstruction of justice:

> "An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted . . . ."

Thus the question in this case comes down to whether it can "clearly be shown" on this record that the petitioner's statements while attempting to make his offers of proof actually obstructed the district judge in "the performance of judicial duty."

The Court of Appeals answered this question by sustaining Specification 6 only on the basis of petitioner's

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[12] *In re Michael*, 326 U. S. 224, 227.

[13] *Ibid.*

[14] 249 U. S. 378, 383.

last sentence in the colloquy set out in the specification. That specification reads:

> "On April 27, 1960, in the presence and hearing of the jury, after the Court had instructed the attorneys for plaintiff to refrain from repeatedly asking questions on subjects which the Court had ruled [were] not admissible, in the presence of the jury as distinguished from an offer of proof outside the presence of the jury, the following occurred:
>
> " 'By Mr. McConnell: Now you are trying to tell us we can't ask these questions. We have a right to ask these questions, and until we are stopped from asking these questions we are going to ask them, because it is in our prerogative in doing it.
>
> " 'By the Court: I am now stopping you from asking the questions about conversations with Mr. Cross, because I have ruled specifically, definitely and completely that it is not an issue in this case.
>
> " 'By Mr. McConnell: We have a right to ask them.
>
> " 'By the Court: You can offer proof on it.
>
> " 'By Mr. McConnell: We have a right to ask questions which we offer on this issue, and Your Honor can sustain their objection to them. *We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us.*' " (Emphasis added.)

The record shows that after this colloquy petitioner's co-counsel asked for a short recess, that following this recess petitioner did not continue to ask questions which the judge had forbidden and that in fact he did not ask any more such questions again throughout the remainder of the trial. We agree with Judge Duffy who dissented below that there was nothing in petitioner's conduct suffi-

ciently disruptive of the trial court's business to be an obstruction of justice. It is true that petitioner stated that counsel had a right to ask questions that the judge did not want asked and that "we propose to do so unless some bailiff stops us." The fact remains, however, that the bailiff never had to interrupt the trial by arresting petitioner, for the simple reason that after this statement petitioner never did ask any more questions along the line which the judge had forbidden. And we cannot agree that a mere statement by a lawyer of his intention to press his legal contention until the court has a bailiff stop him can amount to an obstruction of justice that can be punished under the limited powers of summary contempt which Congress has granted to the federal courts. The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.

While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom, or even from conduct so near to the court as actually to obstruct justice, it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases. An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice. To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice, and we think that that power did not extend to this case.

Reversed.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

With respect to the contempt count that was sustained by the Court of Appeals, this case involves nothing more than an ordinary exercise of the District Court's contempt power in aid of maintaining discipline and decorum in the courtroom. The most, I think, that could appropriately be said of the conviction on this count is that petitioner's unlawyer-like conduct did not merit a jail sentence. The Court of Appeals has removed all basis for criticism on that score by reducing the sentence to a $100 fine. In other respects its opinion displays an alert regard for the undoubted fact that the contempt power should always be exercised circumspectly and dispassionately, particularly when called into play by the conduct of an attorney in the course of sharply contested litigation.

I can hardly believe that the Court intends its opinion to mean that only a physical obstruction of pending judicial proceedings is punishable under 18 U. S. C. § 401. For a court's power to punish summarily for contempt has always been available as a sanction against the use of abusive and insulting language in a courtroom. See, *e. g., Offutt* v. *United States,* 348 U. S. 11; *Fisher* v. *Pace,* 336 U. S. 155, 159–160; *Ex parte Terry,* 128 U. S. 289, 307–309. And it can scarcely be supposed that Congress' enactment of 18 U. S. C. § 401 was intended to abrogate this power, even as the forerunner to that section was construed in *In re Michael,* 326 U. S. 224, 228. Cf. *Ex parte Hudgings,* 249 U. S. 378, 383.

This routine intracircuit affair presents nothing calling for the exercise of this Court's supervisory power, and the case would have been much better left with the Court of Appeals by a denial of certiorari.

I would affirm.

ATKINSON ET AL. *v.* SINCLAIR REFINING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 430. Argued April 18, 1962.—Decided June 18, 1962.

1. Under § 301 of the Labor Management Relations Act, 1947, an employer sued an international union and its local union in a Federal District Court for damages for a strike or work stoppage caused by them in violation of a collective bargaining agreement. The agreement provided for grievance procedures culminating, if requested by the union, in compulsory, final and binding arbitration of employee grievances regarding wages, hours and working conditions, and the union promised not to strike over such matters. The defendants moved to dismiss the complaint on various grounds and to stay the action, for the reasons that (1) all of the issues in the suit were referable to arbitration under the contract, and (2) important issues in the suit were also involved in certain grievances filed by employees and said to be in arbitration under the contract. *Held:* This count of the complaint should not be dismissed or stayed. Pp. 241–245.

   (a) This count of the complaint properly states a cause of action under § 301 and is to be governed by federal law. P. 241.

   (b) The contract here involved is not susceptible to a construction binding the employer to arbitrate its claim for damages against the union for breach of the undertaking not to strike. Pp. 241–243.

   (c) It does not appear from the record that the arbitrator's award on pending employee grievances would determine any significant issue in the damage suit. Pp. 243–245.

2. Basing jurisdiction on diversity of citizenship, the employer, in another count of the same complaint, also sought damages for the same strike or work stoppage from 24 individual employees, each of whom was alleged to have been an agent of the union and to have been acting in a representative capacity when he allegedly fomented or assisted and participated in the strike or work stoppage in violation of the collective bargaining contract. *Held:* Under § 301, this count of the complaint was governed by federal, not state, law and it was properly dismissed for failure to state a claim for which relief could be granted, since it actually was based

on the union's breach of its contract, and a union's officers or members cannot be held personally liable for the union's actions. Pp. 245–249.

290 F. 2d 312, affirmed in part and reversed in part.

Gilbert A. Cornfield argued the cause for petitioners. With him on the briefs were *Gilbert Feldman* and *William E. Rentfro.*

George B. Christensen argued the cause for respondent. With him on the briefs were *Fred H. Daugherty* and *Richard W. Austin.*

J. Albert Woll, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

The respondent company employs at its refinery in East Chicago, Indiana, approximately 1,700 men, for whom the petitioning international union and its local are bargaining agents, and 24 of whom are also petitioners here. In early February 1959, the respondent company docked three of its employees at the East Chicago refinery a total of $2.19. On February 13 and 14, 999 of the 1,700 employees participated in a strike or work stoppage, or so the complaint alleges. On March 12, the company filed this suit for damages and an injunction, naming the international and its local as defendants, together with 24 individual union member-employees.

Count I of the complaint, which was in three counts, stated a cause of action under § 301 of the Taft-Hartley Act (29 U. S. C. § 185) against the international and its local. It alleged an existing collective bargaining agreement between the international and the company containing, among other matters, a promise by the union not to strike over any cause which could be the subject of a grievance under other provisions of the contract. It was

alleged that the international and the local caused the strike or work stoppage occurring on February 13 and 14 and that the strike was over the pay claims of three employees in the amount of $2.19, which claims were properly subject to the grievance procedure provided by the contract. The complaint asked for damages in the amount of $12,500 from the international and the local.

Count II of the complaint purported to invoke the diversity jurisdiction of the District Court. It asked judgment in the same amount against 24 individual employees, each of whom was alleged to be a committeeman of the local union and an agent of the international, and responsible for representing the international, the local, and their members. The complaint asserted that on February 13 and 14, the individuals, "contrary to their duty to plaintiff to abide by said contract, and maliciously confederating and conspiring together to cause the plaintiff expense and damage, and to induce breaches of the said contract, and to interfere with performance thereof by the said labor organizations and the affected employees, and to cause breaches thereof, individually and as officers, committeemen and agents of the said labor organizations, fomented, assisted and participated in a strike or work stoppage . . . ."

Count III of the complaint asked for an injunction but that matter need not concern us here since it is disposed of in *Sinclair Refining Co.* v. *Atkinson, ante,* p. 195, decided this day.

The defendants filed a motion to dismiss the complaint on various grounds and a motion to stay the action for the reasons (1) that all of the issues in the suit were referable to arbitration under the collective bargaining contract and (2) that important issues in the suit were also involved in certain grievances filed by employees and said to be in arbitration under the contract. The District Court denied the motion to dismiss Count I, dismissed Count II, and denied the motion to stay (187 F. Supp.

225). The Court of Appeals upheld the refusal to dismiss or stay Count I, but reversed the dismissal of Count II (290 F. 2d 312), and this Court granted certiorari (368 U. S. 937).

I.

We have concluded that Count I should not be dismissed or stayed. Count I properly states a cause of action under § 301 and is to be governed by federal law. *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 102–104; *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448. Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties. "The Congress . . . has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582. See also *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 570–571 (concurring opinion). We think it unquestionably clear that the contract here involved is not susceptible to a construction that the company was bound to arbitrate its claim for damages against the union for breach of the undertaking not to strike.

While it is quite obvious from other provisions of the contract [1] that the parties did not intend to commit all

[1] The no-strike clause (Article III) provides that "[T]here shall be no strikes . . . (1) For any cause which is or may be the subject of a grievance . . . or (2) For any other cause, except upon written notice by Union to Employer . . . ." Article XXVII, covering "general disputes," provides that disputes which are general in character or which affect a large number of employees are to be negotiated between the parties; there is no provision for arbitration. Moreover, the management-prerogative clause (Article XXXI) recognizes that "opera-

of their possible disputes and the whole scope of their relationship to the grievance and arbitration procedures established in Article XXVI,[2] that article itself is determinative of the issue in this case since it precludes arbitration boards from considering any matters other than employee grievances.[3] After defining a grievance as "any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement," Article XXVI provides that the parties desire to settle employee grievances fairly and quickly and that therefore a stated procedure "must be followed." The individual employee is required to present his grievance to his foreman, and if not satisfied there, he may take his grievance to the plant superintendent who is to render a written decision. There

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tion of the Employer's facilities and the direction of the working forces, including the right to hire, suspend or discharge for good and sufficient cause and pursuant to the seniority Article of this agreement, the right to relieve employees from duties because of lack of work, are among the sole prerogatives of the Employer; provided, however, that . . . such suspensions and discharges shall be subject to the grievance and arbitration clause . . . ."

[2] Article XXVI is set out in full *infra*, at p. 250, as an Appendix.

[3] We do not need to reach, therefore, the question of whether, under the contract involved here, breaches of the no-strike clause are "grievances," *i. e.*, "difference[s] regarding wages, hours or working conditions," or are "grievances" in the more general sense of the term. See *Hoover Express Co.* v. *Teamsters Local, No. 327*, 217 F. 2d 49 (C. A. 6th Cir.). The present decision does not approve or disapprove the doctrine of the *Hoover* case or the Sixth Circuit cases following it (*e. g., Vulcan-Cincinnati, Inc.*, v. *United Steelworkers*, 289 F. 2d 103; *United Auto Workers* v. *Benton Harbor Indus.*, 242 F. 2d 536). See also cases collected in *Yale & Towne Mfg. Co.* v. *Local Lodge No. 1717*, 299 F. 2d 882, 883–884 n. 5, 6 (C. A. 3d Cir.). In *Drake Bakeries, Inc.*, v. *Local 50, post*, p. 254, decided this day, the question of arbitrability of a damages claim for breach of a no-strike clause is considered and resolved in favor of arbitration in the presence of an agreement to arbitrate "all complaints, disputes or grievances arising between them [*i. e.*, the parties] involving . . . any act or conduct or relation between the parties."

is also provision for so-called Workmen's Committees to present grievances to the local management. If the local superintendent's decision is not acceptable, the matter is to be referred for discussion between the President of the International and the Director of Industrial Relations for the company (or their representatives), and for decision by the Director alone. If the Director's decision is disputed, then "upon request of the President or any District Director" of the international, a local arbitration board may be convened and the matter finally decided by this board.

Article XXVI then imposes the critical limitation. It is provided that local arbitration boards "shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement." There is not a word in the grievance and arbitration article providing for the submission of grievances by the company. Instead, there is the express, flat limitation that arbitration boards should consider only employee grievances. Furthermore, the article expressly provides that arbitration may be invoked only at the option of the union. At no place in the contract does the union agree to arbitrate at the behest of the company. The company is to take its claims elsewhere, which it has now done.

The union makes a further argument for a stay. Following the strike, and both before and after the company filed its suit, 14 of the 24 individual defendants filed grievances claiming reimbursement for pay withheld by the employer. The union argues that even though the company need not arbitrate its claim for damages, it is bound to arbitrate these grievances; and the arbitrator, in the process of determining the grievants' right to reimbursement, will consider and determine issues which also underlie the company's claim for damages. Therefore, it is said that a stay of the court action is appropriate.

We are not satisfied from the record now before us, however, that any significant issue in the damage suit

will be presented to and decided by an arbitrator. The grievances filed simply claimed reimbursement for pay due employees for time spent at regular work or processing grievances. Although the record is a good deal less than clear and although no answer has been filed in this case, it would appear from the affidavits of the parties presented in connection with the motion to stay that the grievants claimed to have been disciplined as a result of the work stoppage and that they were challenging this disciplinary action. The company sharply denies in its brief in this Court that any employee was disciplined. In any event, precisely what discipline was imposed, upon what grounds it is being attacked by the grievants, and the circumstances surrounding the withholding of pay from the employees are unexplained in the record. The union's brief here states that the important issue underlying the arbitration and the suit for damages is whether the grievants instigated or participated in a work stoppage contrary to the collective bargaining contract. This the company denies and it asserts that no issue in the damage suit will be settled by arbitrating the grievances.

The District Court must decide whether the company is entitled to damages from the union for breach of contract. The arbitrator, if arbitration occurs, must award or deny reimbursement in whole or in part to all or some of the 14 employees. His award, standing alone, obviously would determine no issue in the damage suit. If he awarded reimbursement to the employees and if it could be ascertained with any assurance [4] that one of his subsidiary findings was that the 14 men had not participated in a forbidden work stoppage—the critical issue according to the union's brief—the company would nevertheless not be foreclosed in court since, even if it were

[4] Arbitrators generally have no obligation to give their reasons for an award. *United Steelworkers* v. *Enterprise Corp.*, 363 U. S. 593, 598; *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203. The record of their proceedings is not as complete as it is in a court trial. *Ibid.*

bound by such a subsidiary finding made by the arbitrator, it would be free to prove its case in court through the conduct of other agents of the union. In this state of the record, the union has not made out its case for a stay.[5]

For the foregoing reasons, the lower courts properly denied the union's motion to dismiss Count I or stay it pending arbitration of the employer's damage claim.

II.

We turn now to Count II of the complaint, which charged 24 individual officers and agents of the union with breach of the collective bargaining contract and tortious interference with contractual relations. The District Court held that under § 301 union officers or members cannot be held personally liable for union actions, and that therefore "suits of the nature alleged in Count II are no longer cognizable in state or federal courts." The Court of Appeals reversed, however, ruling that "Count II stated a cause of action cognizable in the courts of Indiana and, by diversity, maintainable in the District Court."

We are unable to agree with the Court of Appeals, for we are convinced that Count II is controlled by federal law and that it must be dismissed on the merits for failure to state a claim upon which relief can be granted.

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[5] The union also argues that the preemptive doctrine of cases such as *San Diego Bldg. Trades Council* v. *Garmon*, 359 U. S. 236, is applicable and prevents the courts from asserting jurisdiction. Since this is a § 301 suit, that doctrine is inapplicable. *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 101 n. 9.

We put aside, since it is unnecessary to reach them, the questions of whether the employer was excused from arbitrating the damage claim because it was over breach of the no-strike clause (see *Drake Bakeries, Inc.*, v. *Local 50*, *post*, p. 254, decided this day) and whether the underlying factual or legal determination, made by an arbitrator in the process of awarding or denying reimbursement to 14 employees, would bind either the union or the company in the latter's action for damages against the union in the District Court.

Under § 301 a suit for violation of the collective bargaining contract in either a federal or state court is governed by federal law (*Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 102–104; *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448), and Count II on its face charges the individual defendants with a violation of the no-strike clause. After quoting verbatim the no-strike clause, Count II alleges that the 24 individual defendants "contrary to their duty to plaintiff to abide by" the contract fomented and participated in a work stoppage in violation of the no-strike clause. The union itself does not quarrel with the proposition that the relationship of the members of the bargaining unit to the employer is "governed by" the bargaining agreement entered into on their behalf by the union. It is universally accepted that the no-strike clause in a collective agreement at the very least establishes a rule of conduct or condition of employment the violation of which by employees justifies discipline or discharge (*Mastro Plastics Corp.* v. *Labor Board*, 350 U. S. 270, 280 & n. 10; *Labor Board* v. *Rockaway News Co.*, 345 U. S. 71, 80; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332; *Labor Board* v. *Draper Corp.*, 145 F. 2d 199 (C. A. 4th Cir.); *United Biscuit Co.* v. *Labor Board*, 128 F. 2d 771 (C. A. 7th Cir.); see *R. R. Donnelley & Sons Co.*, 5 Lab. Arb. 16; *Ford Motor Co.*, 1 Lab. Arb. 439). The conduct charged in Count II is therefore within the scope of a "violation" of the collective agreement.

As well as charging a violation of the no-strike clause by the individual defendants, Count II necessarily charges a violation of the clause by the union itself. The work stoppage alleged is the identical work stoppage for which the union is sued under Count I and the same damage is alleged as is alleged in Count I. Count II states that the individual defendants acted "as officers, committeemen and agents of the said labor organizations" in breaching

and inducing others to breach the collective bargaining contract. Count I charges the principal, and Count II charges the agents for acting on behalf of the principal. Whatever individual liability Count II alleges for the 24 individual defendants, it necessarily restates the liability of the union which is charged under Count I, since under § 301 (b) the union is liable for the acts of its agents, under familiar principles of the law of agency (see also § 301 (e)). Proof of the allegations of Count II in its present form would inevitably prove a violation of the no-strike clause by the union itself. Count II, like Count I, is thus a suit based on the union's breach of its collective bargaining contract with the employer, and therefore comes within § 301 (a). When a union breach of contract is alleged, that the plaintiff seeks to hold the agents liable instead of the principal does not bring the action outside the scope of § 301.[6]

Under any theory, therefore, the company's action is governed by the national labor relations law which Congress commanded this Court to fashion under § 301 (a). We hold that this law requires the dismissal of Count II for failure to state a claim for which relief can be granted—whether the contract violation charged is that of the union or that of the union plus the union officers and agents.

When Congress passed § 301, it declared its view that only the union was to be made to respond for union

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[6] *Swift & Co.* v. *United Packinghouse Workers,* 177 F. Supp. 511 (D. Colo.). Contra, *Square D Co.* v. *United E., R. & M. Wkrs.,* 123 F. Supp. 776, 779–781 (E. D. Mich.). See also *Morgan Drive Away, Inc.,* v. *Teamsters Union,* 166 F. Supp. 885 (S. D. Ind.), concluding, as we do, that the complaint should be dismissed because of §§ 301 (b) and 301 (e), but for want of jurisdiction rather than on the merits. Our holding, however, is that the suit is a § 301 suit; whether there is a claim upon which relief can be granted is a separate question. See *Bell* v. *Hood,* 327 U. S. 678.

wrongs, and that the union members were not to be subject to levy. Section 301 (b) has three clauses. One makes unions suable in the courts of the United States. Another makes unions bound by the acts of their agents according to conventional principles of agency law (cf. § 301 (e)). At the same time, however, the remaining clause exempts agents and members from personal liability for judgments against the union (apparently even when the union is without assets to pay the judgment). The legislative history of § 301 (b) makes it clear that this third clause was a deeply felt congressional reaction against the *Danbury Hatters* case (*Loewe* v. *Lawlor,* 208 U. S. 274; *Lawlor* v. *Loewe,* 235 U. S. 522), and an expression of legislative determination that the aftermath (*Loewe* v. *Savings Bank of Danbury,* 236 F. 444 (C. A. 2d Cir.)) of that decision was not to be permitted to recur. In that case, an antitrust treble damage action was brought against a large number of union members, including union officers and agents, to recover from them the employer's losses in a nationwide, union-directed boycott of his hats. The union was not named as a party, nor was judgment entered against it. A large money judgment was entered, instead, against the individual defendants for participating in the plan "emanating from headquarters" (235 U. S., at 534), by knowingly authorizing and delegating authority to the union officers to do the acts involved. In the debates, Senator Ball, one of the Act's sponsors, declared that § 301, "by providing that the union may sue and be sued as a legal entity, for a violation of contract, and that liability for damages will lie against union assets only, will prevent a repetition of the Danbury Hatters case, in which many members lost their homes" (93 Cong. Rec. 5014). See also 93 Cong. Rec. 3839, 6283; S. Rep. No. 105, 80th Cong., 1st Sess. 16.

Consequently, in discharging the duty Congress imposed on us to formulate the federal law to govern

§ 301 (a) suits, we are strongly guided by and do not give a niggardly reading to § 301 (b). "We would undercut the Act and defeat its policy if we read § 301 narrowly" (*Lincoln Mills,* 353 U. S., at 456). We have already said in another context that § 301 (b) at least evidences "a congressional intention that the union as an entity, like a corporation, should in the absence of agreement be the sole source of recovery for injury inflicted by it" (*Lewis* v. *Benedict Coal Corp.,* 361 U. S. 459, 470). This policy cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort, or both, in a separate count or in a separate action for damages for violation of a collective bargaining contract for which damages the union itself is liable. The national labor policy requires and we hold that when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages. Here, Count II, as we have said, necessarily alleges union liability but prays for damages from the union agents. Where the union has inflicted the injury it alone must pay. Count II must be dismissed.[7]

The case is remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

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[7] In reaching this conclusion, we have not ignored the argument that Count II was drafted in order to anticipate the possible union defense under Count I that the work stoppage was unauthorized by the union, and was a wildcat strike led by the 24 individual defendants acting not in behalf of the union but in their personal and nonunion capacity. The language of Count II contradicts the argument, however, and we therefore do not reach the question of whether the count would state a proper § 301 (a) claim if it charged unauthorized, individual action.

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APPENDIX TO OPINION OF THE COURT.

Article XXVI provides:

"GRIEVANCE AND ARBITRATION PROCEDURE

"Definition

"1. A grievance is defined to be any difference regarding wages, hours or working conditions between the parties hereto or between the Employer and an employee covered by this working agreement which might arise within any plant or within any region of operations.

"Grievance Procedure

"It is the sincere desire of both parties that employee grievances be settled as fairly and as quickly as possible. Therefore, when a grievance arises, the following procedure must be followed:

"2. For the purpose of adjusting employee grievances and disputes as defined above, it is agreed that any employee, individually or accompanied by his committeeman, if desired shall:

"(a) Seek direct adjustment of any grievance or dispute with the foreman under whom he is employed. Such meeting will be without loss of time to the employee and/or his committeeman during regular working hours for time spent in conference with the foreman. The foreman shall reply to said employee within three (3) working days (Saturday, Sunday and Holidays excluded) from the date on which the grievance was first presented to him;

"(b) If the question is not then settled, the employee may submit his grievance in writing, on forms supplied by Union, to a committee selected as hereinafter provided for the particular plant or region in which such employee is employed. Such committee shall investigate said complaint and if in its opinion the grievance has merit it shall have the right to meet with the local company superintendent or his representative, who shall receive the committee for this purpose. Written decisions shall be made by the local superintendent or his representative within ten (10) days after meeting with the committee, provided that prior to the time of or at the meeting with the committee such complaint or grievance has been submitted in writing to the local superintendent or his representative.

"(c) In exceptional cases, Workmen's Committees shall have the right to institute grievances concerning any alleged violation of this Agreement by filing written complaint with the official locally in charge.

"(d) Any grievance filed with or by the local Workmen's Committee can only be withdrawn with the Workmen's Committee's consent.

"3. No complaint or grievance shall be considered hereunder unless it is presented to the superintendent or official locally in charge within sixty (60) days from the date on which the complaint or grievance arose, or from the date on which the employee or employees concerned first learned of the cause of complaint.

"4. The committee above mentioned shall be selected from among and by employees of the Employer who are members of the Union. No official, foreman, or employee having authority to hire or discharge men shall serve on the committee.

"5. In case of discharge or lay-off, employees who may desire to file complaints must present such complaints within one (1) week after the effective date of discharge or lay-off to the committee mentioned in this Article. Before any such employee is to be discharged for cause, other than flagrant violation of rules, or is to be laid off, he shall be given a written notice, dated and signed by his foreman or other representative of the Employer, setting forth the reason for such discharge or lay-off. In the event an employee has been discharged for a flagrant violation of a company rule, he shall subsequently, upon request, be given a written notice, dated and signed by his foreman or other representative of the Employer setting forth the reason for such discharge. The Workmen's Committee will be furnished with a copy of the statement furnished to the employee, both where the discharge or lay-off is for cause or for flagrant violation of a Company rule. Any grievance to be filed under this section must be filed within forty (40) days from the effective date of the discharge or lay-off.

"6. In the event the decision of the superintendent or his representative shall not be satisfactory to the committee, it is agreed that the President of the Oil, Chemical and Atomic Workers International Union, AFL–CIO, or someone designated by him, shall, not later than forty-five (45) days after such decision, have the right to confer with the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, for the purpose of discussing grievances or disputes and of obtaining decisions thereon. It is agreed that the Director of Industrial Relations for the Sinclair Companies, or someone designated by him, shall render a decision to the President of the Oil, Chemical and Atomic Workers International Union, AFL–CIO, within twenty (20) days after grievances or disputes have been so submitted to him in writing.

"7. If such decision is not satisfactory, then, upon request of the President or any District Director of the Oil, Chemical and Atomic Workers International Union, AFL–CIO and within sixty (60) days from the posting date of the final appeal answer, there shall be set up a local Arbitration Board, and such grievances and disputes submitted to it within ten (10) days after formation of such Board. Such local boards may be set up at each refinery to deal with cases arising therefrom; cases arising from Sinclair Oil & Gas Company shall be heard and determined at Tulsa, Oklahoma; Fort Worth, Texas; Midland, Texas; or Casper, Wyoming; cases arising from Sinclair Pipe Line Company shall be heard and determined at the cities previously named or at Kansas City, Missouri; Toledo, Ohio; Houston, Texas; Chicago, Illinois; Philadelphia, Pennsylvania; or Independence, Kansas. These local Arbitration Boards shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement, or supplements thereto, and local wage and classification disputes submitted on the initiative of the President or any District Director of the Oil, Chemical and Atomic Workers International Union, AFL–CIO. In this connection, Employer agrees to give consideration to local classification rate inequity complaints existing by reason of a comparison with the average of competitive rates of pay for like jobs having comparable duties and responsibilities being paid by agreed-upon major competitive companies in the local area. Such requests for adjustments of classification rate inequities, if any, shall be made not more frequently than twice annually, to be effective on February 1st and August 1st. Such requests to be submitted at least thirty (30) days prior to such semi-annual dates.

"8. The above mentioned local Arbitration Board shall be composed of one person designated by Employer and one designated by the President or District Director of the Oil, Chemical and Atomic Workers International Union, AFL–CIO. The board shall be requested by both parties to render a decision within seven (7) days from date of submission. Should the two members of the board selected as above provided, be unable to agree within seven (7) days, or to mutually agree upon an impartial third arbitrator, an impartial third member shall be selected within seven (7) days thereafter by the employer or employee member of the Arbitration Board, or such two parties jointly, requesting the Federal Mediation and Conciliation Service to submit a panel of arbitrators from which the third member of the board will be selected in accordance with the procedure of such Federal Mediation and Conciliation Service.

"9. The decision of the Board aforesaid, as provided in Section 8 hereof, shall be final. However, if the rules and conditions existing at the time a given case originated are subsequently changed, it is understood that the arbitration award rendered under former rules and conditions shall not act to prohibit consideration of a complaint originating under the changed rules and conditions.

"10. Cases arising from the Gasoline Plants shall be considered as coming within the Producing Division in which they are located.

"11. The fee and expense of the impartial arbitrator selected as above provided shall be divided equally between the parties to such arbitration. The Parties agree to attempt to hold the arbitrator's fees to a reasonable basis."

DRAKE BAKERIES INCORPORATED *v.* LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 598. Argued April 18, 1962.—Decided June 18, 1962.

Under § 301 of the Labor Management Relations Act, 1947, an employer sued a union for damages alleged to have resulted from the union's action in encouraging its members to strike or not to report for work on a certain day in violation of a no-strike clause contained in a collective bargaining agreement between the employer and the union. The contract provided for compulsory, final and binding arbitration, at the request of either party, of "all complaints, disputes or grievances arising between [the parties] involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly." The union moved that the suit be stayed pending arbitration of the dispute, and it supported this motion by an affidavit denying that it had instigated a strike or encouraged its members not to work on the day in question. *Held:* The District Court properly stayed the action pending completion of arbitration. The contract here involved obligates the employer to arbitrate its claim for damages for forbidden strikes by the union, and there are no circumstances in this record which would justify relieving the employer of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union's denials that there was any strike or any breach of contract. Pp. 255–267.

(a) The employer's claim against the union for damages for an alleged strike in violation of the contract is clearly within the scope of the arbitration provisions of the contract here involved. *Atkinson* v. *Sinclair Refining Co., ante,* p. 238, distinguished. Pp. 256–260.

(b) In the circumstances of this case, the alleged one-day strike was not such a breach or repudiation of the arbitration clause by the union that the employer was excused from arbitrating its claim for damages resulting therefrom. Pp. 260–266.

(c) On the record in this case, it cannot be said that the union is not entitled to a stay because it did not proceed with sufficient dispatch in seeking arbitration of the employer's damage claim against it. Pp. 266–267.

294 F. 2d 399, affirmed.

Robert Abelow argued the cause for petitioner. With him on the briefs were *Horace S. Manges* and *Marshall C. Berger.*

Howard N. Meyer argued the cause for respondents. With him on the briefs was *Paul O'Dwyer.*

Edward Maguire filed a brief for the New York State AFL–CIO, as *amicus curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The petitioning company brought this action for damages in the District Court under § 301 (a) of the Taft-Hartley Act, alleging that the respondent union had violated the no-strike clause of the collective bargaining contract between the union and the company. The sole question in the case is whether the District Court was correct in holding that the employer's claim was an arbitrable matter under the contract and in ordering a stay of the action pending completion of arbitration. The Court of Appeals for the Second Circuit affirmed the judgment of the District Court by an equally divided vote.[1] This Court granted certiorari (368 U. S. 975), and set the cause for argument immediately following *Atkinson* v. *Sinclair Refining Co., ante,* p. 238, decided this day.

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[1] The Court of Appeals originally heard the appeal before a three-judge panel, which reversed the judgment below (287 F. 2d 155). But rehearing was ordered before the active judges of the court, who divided 3–3 on the merits, and by a 4–2 vote withdrew the panel decision and affirmed the judgment below (294 F. 2d 399). The propriety of this procedure was questioned in the petition for certiorari, but later petitioner abandoned the question.

The company's business is baking and selling cakes and other bakery products. On December 16, 1959, the company notified the union and its employees that because Christmas and New Year's would fall on Fridays and because it was desirable to have fresh bakery products to sell on the Mondays following the holidays, employees would not work on the Thursdays before Christmas and New Year's but would work on the Saturdays following those holidays. Meetings between the union and the company on December 18 and December 22 ensued, the company's position being that it was exercising management's prerogative in rescheduling work, the union's that the proposed work schedule violated the collective bargaining contract and that the employees were not obligated to work on December 26 or January 2. A compromise arrangement was worked out for December 26, and 80 out of 190 employees reported on that day, a sufficient number to allow production to proceed. Further conversations on December 28 were not fruitful, however, and on Saturday, January 2, the company was unable to produce its goods because only 26 employees reported for work. The company promptly filed this damage action on January 4, 1960, alleging that the union instigated and encouraged its members to strike or not to report for work on January 2, all in violation of the no-strike clause contained in the collective bargaining contract. No answer has been filed by the union but the union's affidavit in support of the motion for stay stated what its answer would contain and specifically denied that the union had instigated a strike or encouraged its members not to work on January 2.

As was true in *Atkinson, supra,* the issue of arbitrability is a question for the courts and is to be determined by the contract entered into by the parties. ". . . [A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steel-*

workers v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582. But the contract here is much different from the agreement in *Atkinson*. Under Article V [2] of the contract: "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly."

This is broad language, indeed, and the procedure thereafter provided in Article V does not, as it did in *Atkinson*, exclude claims or complaints of the employer. It is provided that in the first instance the union will be represented by a committee and the shop chairman, and the employer by the shop manager. Failing adjustment at this stage, the issue is required to be submitted in writing by "the party claiming to be aggrieved to the other party,"

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[2] "Article V—Grievance Procedure

"(a) The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties hereto, directly or indirectly.

"In the adjustment of such matters the Union shall be represented in the first instance by the duly designated committee and the Shop Chairman and the Employer shall be represented by the Shop Management. It is agreed that in the handling of grievances there shall be no interference with the conduct of the business.

"(b) If the Committee and the Shop Management are unable to effect an adjustment, then the issue involved shall be submitted in writing by the party claiming to be aggrieved to the other party. The matter shall then be taken up for adjustment between the Union and the Plant Manager or other representative designated by management for the purpose. If no mutually satisfactory adjustment is reached by this means, or in any event within seven (7) days after the submission of the issue in writing as provided above, then either party shall have the right to refer the matter to arbitration as herein provided."

whereupon the union and the plant manager are to attempt to reach a satisfactory agreement. If agreement is not reached within seven days from the time the issue is submitted in writing, either party "shall have the right to refer the matter to arbitration . . . ."

Article V does not stop with disputes "involving questions of interpretation or application of any clause or matter" covered by the contract. The adjustment and arbitration procedures are to apply to all complaints, all disputes and all grievances involving any act of either party, or any conduct of either party, or any relation between the parties, directly or indirectly. The company asserts that there was a strike by the union in violation of the no-strike clause. It therefore has a "complaint" against the union concerning the "acts" or "conduct" of the union. There is also involved a "dispute" between the union and the company, for the union denies that there was a strike at all, denies that it precipitated any strike, denies that the employees were obligated under the contract to work on that January 2, and itself claims that the employer breached the contract in scheduling work for the holidays.[3] Article V on its face easily reaches the employer's claim against the union for damages caused by an alleged strike in violation of the contract.

The company earnestly contends that the parties cannot have intended to arbitrate so fundamental a matter as a union strike in breach of contract, and that only an

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[3] Immediately before the Christmas weekend in 1959, petitioner and respondent exchanged telegrams, in the course of which exchange respondent charged:

"We have informed you that we did not agree with, or accept your proposal to amend or alter past practice concerning holiday weekends. Your proposed schedule and your threats of disciplinary penalties violates contract and practice . . . . If you do not retract position we shall demand arbitration."

express inclusion of a damage claim by the employer would suffice to require arbitration. But it appears more reasonable to us to expect such a matter, if it is indeed so fundamental and so basic to the company under the contract, to have been excluded from the comprehensive language of Article V if the parties so intended. In Article VII,[4] which contains the no-strike provisions, the parties prohibited strikes, insulated the union, its officers and members from damages for strikes which the union did not authorize, and agreed that, even in the case of unauthorized strikes, the company would arbitrate disciplinary action taken against the strikers. In the face

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[4] "Article VII—No Strikes

"(a) There shall be no strike, boycott, interruption of work, stoppage, temporary walk-out or lock-out for any reason during the terms of this contract except that if either party shall fail to abide by the decision of the Arbitrator, after receipt of such decision, under Article 6 of this contract, then the other party shall not be bound by this provision.

"(b) The parties agree as part of the consideration of this agreement that neither the International Union, the Local Union, or any of its officers, agents or members, shall be liable for damages for unauthorized stoppage, strikes, intentional slowdowns or suspensions of work if:

> "(a) The Union gives written notice to the Company within twenty-four (24) hours of such action, copies of which shall be posted immediately by the Union on the bulletin board that it has not authorized the stoppage, strike, slowdown or suspension of work, and
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> "(b) if the Union further cooperates with the Company in getting the employees to return and remain at work.

"It is recognized that the Company has the right to take disciplinary action, including discharge, against any employee who engages in any unauthorized strike or work stoppage, subject to the Union's right to submit to arbitration in accordance with the agreement the question of whether or not the employee did engage in any unauthorized strike or work stoppage."

of the comprehensive language of Article V, it would have been most appropriate at this point for the parties to have excluded from the arbitration procedures the company's claim for strike damages, if they had intended to do so. Instead, the inclusive coverage of Article V was left intact.

Of significance also are certain events which occurred in August 1959. At that time the company took issue with union conduct in connection with overtime work. Labeling this conduct an "overtime strike" and a "breach of contract," the company wrote a letter to the State Mediation Board of New York saying that the contract with the union provided for arbitration of disputes before an arbitrator appointed by the Board and requesting the appointment of an arbitrator to "determine the question of breach of contract and damages suffered by" the company as a result of the strike. An award of damages against the union was requested, as was injunctive relief against a continuance of the overtime strike.[5] It would appear, then, that the company, just four months earlier in 1959, considered that the fundamental matter of a union-led strike was a dispute to be arbitrated under the provisions of the contract.[6]

The company further asserts that even if it agreed in the contract to arbitrate union violations of the no-strike clause, it is excused by the union's breach from pursuing the post-breach remedies called for in the contract. The

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[5] Apparently the employer's thought was that the federal law should borrow the New York rule which is that an arbitrator may award relief in the nature of an injunction, enforceable in the courts regardless of the New York statute similar to the Norris-LaGuardia Act. *Ruppert* v. *Egelhofer*, 3 N. Y. 2d 576, 148 N. E. 2d 129.

[6] The union opposed arbitration of this dispute, claiming that there was no arbitrable controversy as to the claimed existence of an obligation to work overtime. The parties settled the controversy without conclusive determination of the arbitrability dispute.

company does not deny that grievance and arbitration procedures under this contract—as is true generally (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584)—contemplate as a matter of course the arbitration of many alleged breaches of contract. Indeed, central to the company's position is its assertion that the union was bound to arbitrate, rather than strike over, its claim that the company breached the contract by scheduling Saturday work. But in its view, the union's violation of the no-strike clause is *sui generis* and so basic to what the employer bargained for in the contract and so inherently and "fundamentally inconsistent with" the grievance and arbitration procedures that the faithful observance of the no-strike clause by the union is a condition precedent to the employer's duty to arbitrate (even though he has promised to do so), or that the union must be deemed to have waived, or to be estopped from asserting, its right to arbitrate.

However, this Court has prescribed no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining contract in every situation.[7] The company has not attempted, or claimed the right, either to terminate the entire contract or to extinguish permanently its obligations under the arbitration provisions. Instead, it has sued for damages for an alleged strike and, as far as this record reveals, the contract continued in effect, as did the promises of the parties to arbitrate and the promise of the union not to strike. Moreover, in this

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[7] We do not understand the opinions in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 455, or *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting, or to justify either party to the contract in wrenching them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties.

case, under this contract, by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes. They have thus cut the ground from under the argument that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise.[8] Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, even total breach;[9] and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudia-

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[8] In *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 105–106, it was held that a clause requiring the parties to submit disputes to final determination by arbitration implied an obligation not to strike over such disputes. Accordingly, the Court upheld an employer's § 301 breach of contract suit against the union for strike damages due to a walkout over an arbitrable dispute. In that case, unlike the present one, the union conceded that there had been a strike over a grievance which the union had agreed to submit to arbitration. The only question in dispute was liability *vel non*. The union did not contend that, and the Court did not consider whether, the employer's damage claim should have been taken to an arbitrator. And, of course, the Court did not consider whether the union's breach of the no-strike clause constituted a repudiation or waiver of arbitration of the damage claim.

[9] See *In re Pahlberg Petition*, 131 F. 2d 968 (C. A. 2d Cir.); *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978 (C. A. 2d Cir.); *Pennsylvania Greyhound Lines* v. *Amalgamated Assn.*, 98 F. Supp. 789 (W. D. Pa.), rev'd on other grounds, 193 F. 2d 327 (C. A. 3d Cir.); *Batter Bldg. Mats. Co.* v. *Kirschner*, 142 Conn. 1, 110 A. 2d 464; *Heyman* v. *Darwins, Ltd.*, [1942] A. C. 356 (H. L.) (disapproving *Jureidini* v. *National Br. & Ir. Ins. Co.*, [1915] A. C. 499, 505 (H. L.)). See also *Shanferoke Coal Corp.* v. *Westchester Serv. Corp.*, 70 F. 2d 297, 299 (C. A. 2d Cir.), aff'd, 293 U. S. 449, 453–454.

tion are critically important.[10] In this case the union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself which ignored the adjustment and arbitration provisions by scheduling holiday work.

In passing § 301, Congress was interested in the enforcement of collective bargaining contracts since it would "promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace" (S. Rep. No. 105, 80th Cong., 1st Sess. 17). It was particularly interested in placing "sanctions behind agreements to arbitrate grievance disputes" (*Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 456). The preferred method for settling disputes was declared by Congress to be "[f]inal adjustment by a method agreed upon by the parties" (§ 203 (d) of the Act, 29 U. S. C. § 173 (d)). "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play" (*United Steelworkers* v. *American Mfg. Co.,* 363 U. S. 564, 566). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the

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[10] 6 Corbin, Contracts § 1443 (1961 Supp., n. 34, pp. 192–193) states:

"The effect of a repudiation upon the repudiator's right to arbitration should depend on the character of his so-called 'repudiation' and the reasons given for it. One who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party. But mere nonperformance, even though unjustified, is not *per se* a 'repudiation.' One who asserts in good faith that the facts justify him in refusing performance of other provisions in the contract should not thereby lose his right to arbitration that he would otherwise have had. There is no inconsistency in his demanding arbitration at the same time that he asserts his legal privilege not to proceed with performance."

collective bargaining contract in a situation such as this. We could enforce only the no-strike clause by refusing a stay in the suit for damages in the District Court. We can enforce both the no-strike clause and the agreement to arbitrate by granting a stay until the claim for damages is arbitrated. This we prefer to do.[11]

Petitioner relies upon decisions by various Courts of Appeals denying stays of damage suits for breach of no-strike clauses for want of arbitrability of the dispute.[12] Most of them, however, involved far more narrowly drawn arbitration clauses than that which is involved here.[13] And in at least two Court of Appeals decisions involving clauses of comparable breadth to that of the instant case, violations of no-strike clauses have been held to be arbi-

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[11] Cf. *Boone* v. *Eyre*, 1 Bl. H. 273, 126 Eng. Rep. 160 (K. B. 1777) (L. Mansfield): ". . . [W]here mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." See also *Dermott* v. *Jones*, 23 How. 220, 231.

[12] These cases are collected in the withdrawn decision of the three-judge panel of the Court of Appeals, 287 F. 2d 155, 158 n. 4. See also *Vulcan-Cincinnati, Inc.*, v. *United Steelworkers*, 289 F. 2d 103 (C. A. 6th Cir.).

[13] *E. g.*, *United Furniture Workers* v. *Colonial Hardwood Co.*, 168 F. 2d 33 (C. A. 4th Cir.), where arbitration was limited to employee grievances over wages, hours, or working conditions, as in *Atkinson* v. *Sinclair Refining Co.*, *ante*, p. 238; and *United Automobile Workers* v. *Benton Harbor Indus.*, 242 F. 2d 536 (C. A. 6th Cir.); *Cuneo Press, Inc.*, v. *Kokomo Union*, 235 F. 2d 108 (C. A. 7th Cir.), where arbitration was limited to employee grievances. But see *United E., R. & M. Wkrs.* v. *Miller Metal Prods., Inc.*, 215 F. 2d 221 (C. A. 4th Cir.) ("[a]ll differences, disputes and grievances that may arise between the parties to this contract with respect to the matters covered in this agreement"); *Markel Elec. Prods., Inc.*, v. *United E., R. & M. Wkrs.*, 202 F. 2d 435 (C. A. 2d Cir.) ("differences . . . as to the meaning and application of the provisions of this agreement, or . . . any trouble of any kind . . . in the plant").

trable and suits for damages have been stayed pending arbitration.[14]

This Court held in *Mastro Plastics Corp.* v. *Labor Board,* 350 U. S. 270, that the employer did not have the right to replace employees who had struck over employer unfair labor practices, in the face of an absolute no-strike clause. It was said that, despite the broad prohibition of strikes in the contract, the parties could not have intended to waive the employees' right to strike over a flagrant unfair labor practice, absent an express statement in the contract to that effect. The company urges that *Mastro* precludes the result we have reached in this case. *Mastro,* however, involved a flagrant unfair labor practice by the company threatening the very existence of the union itself. A strike in violation of contract is not *per se* an unfair labor practice [15] and there is no suggestion in this record that the one-day strike involved here was of that nature. We do not decide in this case that in no circumstances would a strike in violation of the no-strike clause contained in this or other contracts entitle the employer to rescind or abandon the entire contract or to declare its promise to arbitrate forever discharged or to refuse to arbitrate its damage claims against the union. We do decide and hold that Article V of this contract obligates the company to arbitrate its claims for damages from forbidden strikes by the union and that there are no circumstances in this record which justify relieving

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[14] *Signal-Stat Corp.* v. *Local 475,* 235 F. 2d 298 (C. A. 2d Cir.); *Yale & Towne Mfg. Co.* v. *Local 1717,* 299 F. 2d 882 (C. A. 3d Cir.). See *id.,* at 883–884 n. 5, collecting authorities from lower courts. Under New York law, broad arbitration clauses permit arbitrators to award damages. See *In re Publishers Assn.,* 8 N. Y. 2d 414, 171 N. E. 2d 323.

[15] *United Mine Workers* v. *Labor Board,* 103 U. S. App. D. C. 207, 257 F. 2d 211; *Lodge No. 12* v. *Cameron Iron Works, Inc.,* 257 F. 2d 467, 473 (C. A. 5th Cir.); see *Dowd Box Co.* v. *Courtney,* 368 U. S. 502, 513; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41–42.

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the company of its duty to arbitrate the consequences of this one-day strike, intertwined as it is with the union's denials that there was any strike or any breach of contract at all.

If the union did strike in violation of the contract, the company is entitled to its damages; by staying this action, pending arbitration, we have no intention of depriving it of those damages. We simply remit the company to the forum it agreed to use for processing its strike damage claims. That forum, it is true, may be very different from a courtroom,[16] but we are not persuaded that the remedy there will be inadequate. Whether the damages to be awarded by the arbitrator would not normally be expected to serve as an "effective" deterrent to future strikes, which the company urges, is not a question to be answered in the abstract or in general terms. This question, as well as what result will best promote industrial peace, can only be answered in the factual context of particular cases. Here, the union claims it did not call a strike and that the men were not bound to work on January 2, basing its claim upon years of past practice under the contract. The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain.

A final matter is the company's suggestion that the union is not entitled to a stay because it has not proceeded with dispatch in seeking arbitration. The District Court held that the union was not in default, and we agree. If the company had a claim for damages, the contract provided for the company's attempting to adjust its claim by consulting with the union. Failing this, either party could take the matter to arbitration. The company's claim arose out of events which occurred on

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[16] *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 203.

January 2. This case was filed on January 4. This was the first occasion for the union to insist upon its right to arbitrate the employer's claim for damages. This it promptly did by moving for a stay in the District Court.[17] As its conduct shows in a previous situation, the employer was aware of the procedure to be followed.[18] It should have followed it here.

For the foregoing reasons, the judgment affirming the opinion of the District Court was correct, and, on the merits, the panel decision properly withdrawn.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, dissenting.

The question presented in this case is whether the parties to this collective bargaining agreement intended that a court, rather than an arbitrator, should decide the employer's claim that the union had violated the no-strike clause of the agreement. Whether a strike in breach of contract has occurred and, if so, what damages have been suffered, are matters with respect to which a court of law can hardly be deemed less competent, as an adjudicator, than an arbitrator. There is no special reason to suppose that the parties preferred to submit this kind of a dispute to an arbitrator whose expertise is more likely to be in the area of employees' grievance claims, as in *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 580–582; *United Steelworkers* v. *Enterprise Wheel &*

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[17] Compare *Shanferoke Coal Corp.* v. *Westchester Serv. Corp.*, 70 F. 2d 297, 299 (C. A. 2d Cir., L. Hand, J.), aff'd, 293 U. S. 449, 453–454, with *Lane, Ltd.* v. *Larus & Bro. Co.*, 243 F. 2d 364 (C. A. 2d Cir.).

[18] See text accompanying notes 5–6, *supra*.

Car Corp., 363 U. S. 593, 597–598. The less so, from the standpoint of the employer, when it is recognized that any damages awarded by an arbitrator would not be self-enforcing.

It would require more persuasive evidence than either this collective agreement or record affords to persuade me that it was contemplated that the employer would forego his statutory remedy under § 301 respecting alleged violations of the no-strike clause of the collective agreement. I would reverse the judgment below substantially for the reasons given in the panel opinion of the Court of Appeals, 287 F. 2d 155.

Per Curiam.

RUDOLPH ET UX. *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 396. Argued April 3, 1962.—Decided June 18, 1962.

An insurance company paid the expenses of a group of its agents and their wives, including petitioners, to New York City to attend an annual convention, and the Commissioner assessed the value of the trip to petitioners as taxable income. In a suit for refund, the District Court found that the trip was provided by the company primarily for the purpose of affording a pleasure trip in the nature of a bonus, reward, and compensation for a job well done and that, from the point of view of petitioners, it was primarily a pleasure trip and that, therefore, the value of the trip was income and the costs were personal and nondeductible. The Court of Appeals approved these findings. *Held:* Since the ultimate facts are subject to the "clearly erroneous" rule and their review would be of no importance save to the litigants themselves, the writ of certiorari is dismissed as improvidently granted. Pp. 269–270.

Reported beow: 291 F. 2d 841.

Richard A. Freling argued the cause for petitioners. With him on the briefs was *Felix Atwood.*

John B. Jones, Jr. argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett, I. Henry Kutz* and *Norman H. Wolfe.*

Charles W. Merritt filed a brief for the American Hotel Association, as *amicus curiae,* urging reversal.

PER CURIAM.

The petition for certiorari in this case was granted because it was thought to present important questions involving the definition of "income" and "ordinary and necessary" business expenses under the Internal Revenue Code. 368 U. S. 913. An insurance company provided

a trip from its home office in Dallas, Texas, to New York City for a group of its agents and their wives. Rudolph and his wife were among the beneficiaries of this trip, and the Commissioner assessed its value to them as taxable income.* It appears to be agreed between the parties that the tax consequences of the trip turn upon the Rudolphs' "dominant motive and purpose" in taking the trip and the company's in offering it. In this regard the District Court, on a suit for a refund, found that the trip was provided by the company for "the primary purpose of affording a pleasure trip . . . in the nature of a bonus, reward, and compensation for a job well done" and that from the point of view of the Rudolphs it "was primarily a pleasure trip in the nature of a vacation . . . ." 189 F. Supp. 2, 4–5. The Court of Appeals approved these findings. 291 F. 2d 841. Such ultimate facts are subject to the "clearly erroneous" rule, cf. *Commissioner* v. *Duberstein,* 363 U. S. 278, 289–291 (1960), and their review would be of no importance save to the litigants themselves. The appropriate disposition in such a situation is to dismiss the writ as improvidently granted. See *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U. S. 70, 78 n. 2 (1955).

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

Separate opinion of MR. JUSTICE HARLAN.

Although the reasons given by the Court for dismissing the writ as improvidently granted should have been persuasive against granting certiorari, now that the case is here I think it better to decide it, two members of the Court having dissented on the merits.

*A joint return had been filed.

The courts below concluded (1) that the value of this "all expense" trip to the company-sponsored insurance convention constituted "gross income" to the petitioners within the meaning of § 61 of the Internal Revenue Code of 1954, and (2) that the amount reflected was not deductible as an "ordinary and necessary" business expense under § 162 of the Code.[1] Both conclusions are, in my opinion, unassailable unless the findings of fact on which they rested are to be impeached by us as clearly erroneous. I do not think they can be on this record, especially in light of the "seasoned and wise rule of this Court" which "makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 214.

The basic facts, found by the District Court, are as follows. Petitioners, husband and wife, reside in Dallas, Texas, where the home office of the husband's employer, the Southland Life Insurance Company, is located. By having sold a predetermined amount of insurance, the husband qualified to attend the company's convention in New York City in 1956 and, in line with company policy, to bring his wife with him. The petitioners, together with 150 other employees and officers of the insurance company and 141 wives, traveled to and from New York City on special trains, and were housed in a single hotel during their two-and-one-half-day visit. One morning was devoted to a "business meeting" and group luncheon, the rest of the time in New York City to "travel, sightseeing, entertainment, fellowship or free time." The entire trip lasted one week.

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[1] As I see this case, there is no need to explore whether the proper reporting procedure for a *deductible* expense is not to include it in income in the first place, cf. Treas. Reg. § 1.162–17 (b), or to "run it through" the taxpayer's income with an offsetting deduction in the same amount.

The company paid all the expenses of the convention-trip which amounted to $80,000; petitioners' allocable share being $560. When petitioners did not include the latter amount in their joint income tax return, the Commissioner assessed a deficiency which was sustained by the District Court, 189 F. Supp. 2, and also by the Court of Appeals, one judge dissenting, in a *per curiam* opinion, 291 F. 2d 841, citing its recent decision in *Patterson* v. *Thomas*, 289 F. 2d 108, where the same result had been reached. The District Court held that the value of the trip being "in the nature of a bonus, reward, and compensation for a job well done," was income to Rudolph, but being "primarily a pleasure trip in the nature of a vacation," the costs were personal and nondeductible.

I.

Under § 61 of the 1954 Code was the value of the trip to the taxpayer-husband properly includible in gross income? That section defines gross income as "all income from whatever source derived," including, among other items, "compensation for services." Certain sections of the 1954 Code enumerate particular receipts which are included in the concept of "gross income," [2] including prizes and awards (with certain exceptions); [3]

[2] *E. g.*, § 71 (Alimony and separate maintenance payments), § 72 (Annuities; certain proceeds of endowment and life insurance contracts), § 73 (Services of child).

[3] § 74: "(a) GENERAL RULE.—Except as provided in subsection (b) and in section 117 (relating to scholarships and fellowship grants), gross income includes amounts received as prizes and awards.

"(b) EXCEPTION.—Gross income does not include amounts received as prizes and awards made primarily in recognition of religious, charitable, scientific, educational, artistic, literary, or civic achievement, but only if—

"(1) the recipient was selected without any action on his part to enter the contest or proceeding; and

"(2) the recipient is not required to render substantial future services as a condition to receiving the prize or award."

while other sections, §§ 101–121, specifically exclude certain receipts from "gross income," including, for example, gifts and inheritances [4] (see *Commissioner* v. *Duberstein*, 363 U. S. 278), and meals or lodgings furnished for the convenience of the employer.[5] The Treasury Regulations emphasize the inclusiveness of the concept of "gross income." [6]

In light of the sweeping scope of § 61 taxing "all gains except those specifically exempted," *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 430; see *Commissioner* v. *LoBue*, 351 U. S. 243, 246; *James* v. *United States*, 366 U. S. 213, 219, and its purpose to include as taxable income "any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected," *Commissioner* v. *Smith*, 324 U. S. 177, 181, it seems clear that the District Court's findings, if sustainable, bring the value of the trip within the reach of the statute.

Petitioners do not claim that the value of the trip is within one of the statutory exclusions from "gross income" (see notes 4 and 5, *supra*) as did the taxpayer in *Patterson* v. *Thomas*, 289 F. 2d 108, 111–112; rather they characterize the amount as a "fringe benefit" not specifically

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[4] § 102.

[5] § 119. Some of the other exclusions are § 101 (Certain death payments), § 103 (Interest on certain governmental obligations), § 104 (Compensation for injuries or sickness), § 105 (Amounts received under accident and health plans), § 113 (Mustering-out payments for members of the Armed Forces), § 117 (Scholarship and fellowship grants).

[6] Treas. Reg. § 1.61–1 (a) provides:

"Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash." See also Treas. Reg. § 1.61–2 (a)(1), (d) and § 1.74–1 (a).

excluded from § 61 by other sections of the statute, yet not intended to be encompassed by its reach. Conceding that the statutory exclusions from "gross income" are not exhaustive, as the Government seems to recognize is so under *Glenshaw*, it is not now necessary to explore the extent of any such nonstatutory exclusions.[7] For it was surely within the Commissioner's competence to consider as "gross income" a "reward, or a bonus given to . . . employees for excellence in service," which the District Court found was the employer's primary purpose in arranging this trip. I cannot say that this finding, confirmed as it has been by the Court of Appeals, is inadequately supported by this record.[8]

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[7] Petitioners rely on § 3401 of the 1954 Code, relating to withholding taxes, and more especially on Treas. Reg. § 31.3401 (a)–1 (b)(10) providing that certain fringe benefits are not considered "wages" subject to withholding. The Government admits that not all "fringe benefits" have been taxed as income, but it is enough to point out here that the withholding tax analogy is not perfect, for payments to laid-off employees from company-financed supplemental unemployment benefit plans are "taxable income" to the employees although not "wages" subject to withholding. Rev. Rul. 56–249, 1956–1 Cum. Bull. 488, as amplified by Rev. Rul. 60–330, 1960–2 Cum. Bull. 46.

[8] The District Court said (189 F. Supp., at 4–5):

"All of the evidence considered, we think it irrefutably leads to this conclusion: That the insurance company was just doing a gracious magnanimous thing of awarding those leading agents a trip just as much as if it had awarded them an automobile, or suit of clothes . . . .

. . . . . .

". . . [W]e conclude, that the trip was earned by . . . Rudolph, and was in the nature of a bonus, reward, and compensation for a job well done."

It is pertinent to note that in addition to the facts referred to on p. 271, *supra*, the record shows that company-sponsored conventions of the same kind have in recent years been held in Canada, Mexico City, Havana, Colorado and California, places well known for their appeal to tourists, and far removed from the home office in Dallas. While this factor alone does not render the expenses nondeductible, see I. R. S. News Rel. No. IR–394, August 3, 1961, it certainly was a relevant circumstance for the District Court to consider.

II.

There remains the question whether, though income, this outlay for transportation, meals, and lodging was deductible by petitioners as an "ordinary and necessary" business expense under § 162.[9] The relevant factors on this branch of the case are found in Treas. Reg. § 1.162–2.[10] In summary, the regulation in pertinent part provides:

> Traveling expenses, including meals, lodgings and other incidentals, reasonable and necessary in the conduct of the taxpayer's business and directly attributable to it are deductible, but expenses of a trip

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[9] "(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

. . . . . .

"(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business . . . ."

No question is raised in this case as to whether the $80,000 paid by the company for the total convention expense is deductible by the corporation.

There is no need to explore the lack of symmetry in certain "income" and "deductibility" areas in the 1954 Code permitting employers to provide certain "fringe benefits" to employees—such as parking facilities, swimming pools, medical services—which have not generally been considered income to the employee, but which, if paid for by the employee with his own funds, would not be a deductible expense. The practicalities of a tax system do not demand hypothetical or theoretical perfection, and these workaday problems are properly the concern of the Commissioner, not of the Courts.

[10] Although this Regulation is part of those promulgated on April 3, 1958, it is applicable to this 1956 transaction. The power to make the Regulations prospective only, Int. Rev. Code of 1954, § 7805 (b), was not exercised, and they were made applicable to taxable years beginning after December 31, 1953. T. D. 6291, 1958–1 Cum. Bull. 63. Moreover, the result here would not be different under the prior comparable Regulation. Treas. Reg. 118, § 39.23 (a)–2 (a).

"undertaken for other than business purposes" are "personal expenses" and the meals and lodgings are "living expenses." Treas. Reg. § 1.162–2 (a).

If a taxpayer who travels to a destination engages in both "business and personal activities," the traveling expenses are deductible only if the trip is "related primarily" to the taxpayer's business; if "primarily personal," the traveling expenses are not deductible even though the taxpayer engages in some business there; yet expenses allocable to the taxpayer's trade or business there are deductible even though the travel expenses to and fro are not.[11] *Id.*, § 1.162–2 (b)(1).

Whether a trip is related primarily to the taxpayer's business or is primarily personal in nature "depends on the facts and circumstances in each case." *Id.*, § 1.162–2 (b)(2); so too with expenses paid or incurred in attending a convention. *Id.*, § 1.162–2 (d).

Finally, the deductibility of the expenses of a taxpayer's wife who accompanies her husband depends, first, on whether his trip is a "business trip." *Id.*, § 1.162–2 (c); if so, it must further be shown that the wife's presence on the trip also had a bona fide business purpose. *Ibid.*

Where, as here, it may be arguable that the trip was both for business and personal reasons, the crucial question is whether, under all the facts and circumstances of the case, the purpose of the trip was "related primarily to business" or was, rather, "primarily personal in nature."

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[11] No claim has been made by the husband in this case that specific business expenses which may have been incurred at the convention in New York are deductible. The only issue is the deductibility of the entire trip expense. Compare *Patterson* v. *Thomas*, 289 F. 2d 108, 114 and n. 13.

That other trips to other conventions or meetings by other taxpayers were held to be primarily related to business is of no relevance here; that certain doctors, lawyers, clergymen, insurance agents or others [12] have or have not been permitted similar deductions only shows that in the circumstances of those cases, the courts thought that the expenses were or were not deductible as "related primarily to business."

The husband places great emphasis on the fact that he is an entrapped "organization man," required to attend such conventions, and that his future promotions depend on his presence. Suffice it to say that the District Court did not find any element of compulsion; to the contrary, it found that the petitioners regarded the convention in New York City as a pleasure trip in the nature of a vacation. Again, I cannot say that these findings are without adequate evidentiary support. *Supra,* pp. 273–274.

The trip not having been primarily a business trip, the wife's expenses are not deductible. It is not necessary, therefore, to examine whether they would or would not be deductible if, to the contrary, the husband's trip was related primarily to business.

Where, as here, two courts below have resolved the determinative factual issues against the taxpayers, according to the rules of law set forth in the statute and regu-

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[12] Deductions allowed: *Coffey* v. *Commissioner,* 21 B. T. A. 1242 (doctor); *Coughlin* v. *Commissioner,* 203 F. 2d 307 (lawyer); *Shutter* v. *Commissioner,* 2 B. T. A. 23 (clergyman); *Callinan* v. *Commissioner,* 12 T. C. M. 170 (legal secretary); see Rev. Rul. 59–316, 1959–2 Cum. Bull. 57; Rev. Rul. 60–16, 1960–1 Cum. Bull. 58.

Deductions not allowed: *Duncan* v. *Commissioner,* 30 T. C. 386 (doctor); *Ellis* v. *Burnet,* 60 App. D. C. 193, 50 F. 2d 343 (lawyer); *Reed* v. *Commissioner,* 35 T. C. 199 (lawyer); *Patterson* v. *Thomas,* 289 F. 2d 108 (insurance agent); *Russell* v. *Commissioner,* 11 T. C. M. 334 (railroad fireman).

lations, it is not for this Court to re-examine the evidence, and disturb their findings, unless "clearly erroneous." That is not the situation here.

I would affirm.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK joins, dissenting.

I.

It could not, I think, be seriously contended that a professional man, say a Senator or a Congressman, who attends a convention to read a paper or conduct a seminar *with all expenses paid* has received "income" within the meaning of the Internal Revenue Code. Nor would it matter, I assume, that he took his wife and that her expenses were also paid. Income has the connotation of something other than the mere payment of expenses. The statute, 26 U. S. C. § 61, speaks in terms of financial gain, of compensation for services, "including fees, commissions, and similar items." The form of payment for services covers a wide range. Treasury Regulations § 1.61–1 provide:

> "Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash."

The formula "all expenses paid" might be the disguise whereby compensation "for services" is paid. Yet it would be a rare case indeed where one could conclude that a person who gets only his expenses for attendance at one convention gets "income" in the statutory sense. If this arrangement were regular and frequent or if it had the earmarks of a sham device as a cloak for remuneration, there would be room for fact-finders to conclude that

it was evasive. But isolated engagements of the kind here in question have no rational connection with compensation "for services" rendered.

It is true that petitioner was an employee and that the expenses for attending the convention were paid by his employer. He qualified to attend the convention by selling an amount of insurance that met a quota set by the company. Other salesmen also qualified, some attending and some not attending. They went from Dallas, Texas, to New York City, where they stayed two and a half days. One day was given to a business session and a luncheon; the rest of the time was left for social events.

On this record there is no room for a finding of fact that the "expenses paid" were "for services" rendered. They were apparently a proper income tax deduction for the employer. The record is replete with evidence that from management's point of view it was good business to spend money on a convention for its leading agents—a convention that not only kept the group together in New York City, but in transit as well, giving ample time for group discussions, exchanges of experience, and educational training. It was the exigencies of the employment that gave rise to the convention. There was nothing dishonest, illegitimate, or unethical about this transaction. No services were rendered. New York City may or may not have been attractive to the agents and their wives. Whether a person enjoys or dislikes the trip that he makes "with all expenses paid" has no more to do with whether the expenses paid were compensation "for services" rendered than does his attitude toward his job.

In popular understanding a trip to a convention "with all expenses paid" may be an award. Yet the tax laws are filled with exemptions for "awards" which are not considered to be income. The exemption of gifts is one example. Others are the exemptions of the proceeds

of life insurance payable at death, disability benefits, the rental values of parsonages, scholarship and fellowship grants, allowances of U. S. employees abroad, mustering-out payments to members of the Armed Forces, etc. Employees may receive from their employers many fringe benefits that are not income. Treasury Regulations § 31.3401 (a)–1 (b)(10) provide:

> "Ordinarily, facilities or privileges (such as entertainment, medical services, or so-called 'courtesy' discounts on purchases), furnished or offered by an employer to his employees generally, are not considered as wages subject to withholding if such facilities or privileges are of relatively small value and are offered or furnished by the employer merely as a means of promoting the health, good will, contentment, or efficiency of his employees."

The fringe benefits of this one convention trip are less obviously income than the fringe benefits listed in the Regulations. For the latter are constantly recurring—day after day, week after week. Moreover, on this record the convention promotes the "efficiency" of the agents as much as the other fringe benefits enumerated in the Regulations.

II.

The expenses, if "income," are plainly deductible. The Government, however, says that our problem is to determine "whether it is consistent with the ends of an equitable and workable tax system" to make them such. The problem of designing an "equitable" tax system is, however, for Congress, not for the Court.

The test of deductibility to be applied here is whether the expenses are "ordinary and necessary" in the carrying on of petitioner's business. The Act is explicit in permitting the deduction of traveling expenses (including the

entire amount expended for meals and lodging) while away from home in the "pursuit of a trade or business," 26 U. S. C. § 162 (a)(2).

The Regulations are even more explicit. Section 1.162–2 (b)(1) provides:

> "If a taxpayer travels to a destination and while at such destination *engages in both business and personal activities,* traveling expenses to and from such destination are deductible only if the trip is related *primarily* to the taxpayer's trade or business. If the trip is primarily personal in nature, the traveling expenses to and from the destination are not deductible even though the taxpayer engages in business activities while at such destination." (Italics added.)

Thus, by the very terms of the Regulations a taxpayer who combines business and pleasure may deduct all "traveling expenses," provided the business purpose is dominant.

Section 1.162–2 (b)(2) of the Regulations states:

> "Whether a trip is related primarily to the taxpayer's trade or business or is primarily personal in nature depends on the facts and circumstances in each case. The amount of time during the period of the trip which is spent on personal activity compared to the amount of time spent on activities directly relating to the taxpayer's trade or business is an important factor in determining whether the trip is primarily personal. If, for example, a taxpayer spends one week while at a destination on activities which are directly related to his trade or business and subsequently spends an additional five weeks for vacation or other personal activities, the trip will be considered primarily personal in nature in the absence of a clear showing to the contrary."

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Where, as here, at least one-half of the time is spent on mundane "business" activities,[1] the case is nowhere near the colorable transaction described in § 1.162–2 (b)(2).

I see no reason to take this case out of the main stream of precedents and establish a special rule for insurance conventions. Judge Brown, dissenting in the Court of Appeals, shows how discriminatory this decision is:

> "Deductions have been allowed as 'ordinary and necessary' to clergymen attending a church convention; to expenses of an employee attending conventions of a related business group; to a lawyer attending a meeting of the American Bar Association; to a legal secretary attending the national convention of the National Association; to physicians attending medical conventions; to certified public accountants attending conventions; to university teachers in attending conventions or scientific meetings; to professional cartoonists attending political conventions; to persons attending the Red Cross Convention; to school teachers attending summer school; to attorneys attending an institute on Federal taxation; to employees sent to refresher courses to become more acquainted with new processes in the industry; to a furniture store sending its buyers to the annual furniture mart; to representatives to annual conventions of trade associations; and to an insurance agent away from home on business." 291 F. 2d 841, 844–845.

Insurance conventions go back at least to 1924 (Report No. 15, Life Insurance Sales Research Bureau, Nov. 1924) and are premised on the idea that agents and companies

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[1] The travel to and from the convention was in a group, so arranged as to develop solidarity among the agents, and to provide a continuing seminar.

benefit from the knowledge and increase in morale which result from them.[2] Why they should be treated differently from other conventions is a mystery. It cannot be, as the district judge thought and as the Government seems to argue, because going to New York City is, as a matter of law, a "pleasure trip." If we are in the field of judicial notice, I would think that some might conclude that the weekend in New York City was a chore and that those who went sacrificed valuable time that might better have

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[2] "One of the chief things to be accomplished by a convention is to secure unanimous understanding of the principles underlying the company's sales operations and the rules which experience has proved to be essential in carrying out those principles. There is no sales organization anywhere which has a complete and unanimous grasp of these matters but a convention can do more to give the men that grasp than anything else. Home Offices are constantly under the necessity of formulating principles and rules, and they are similarly in a constant state of disappointment because they are not understood. The convention is the place above all others where this can be accomplished.

. . . . .

"The extent to which the Home Office arranges for transportation depends largely upon the situation of the convention city. If it is centrally located with many lines of approach, it would be impracticable to arrange for many men to meet on their way to the convention. But if the convention is to be held in an isolated spot, or one at considerable distance from the home of the majority of the members attending, then specific plans may be made for assembling at some nearer location and proceeding together to the destination. If this latter is at all feasible, it is desirable for several reasons. It gives the men a peculiar feeling of satisfaction to travel on a 'special' train or on 'special' cars, it encourages a friendlier feeling than is generally present at conventions at which the men arrive as strangers, it makes the men more anxious to get down to the real work of the convention when they arrive at their destination, and, above all, it has a decided educational value in its contacts and ever present business discussions." Report No. 15, Life Insurance Sales Research Bureau, Nov. 1924, pp. 13, 17–18.

been spent on the farm, in the woods, or along the seashore.

Moreover, federal revenue agents attending their convention are given a deduction for the expenses they incur. We are advised that

> ". . . the Commissioner has recently withdrawn his objections in two Tax Court cases to the deduction of convention expenses incurred by two IRS employees in attending conventions of the National Association of Internal Revenue Employees.
>
> "No explanation has been given publicly for the Tax Court action of the Commissioner, it being generally presumed that the IRS employees met the tests of Reg. § 1.162–2 (d) by showing a sufficient relationship between the trade or business of being an IRS employee and attendance at conventions of the NAIRE. The National Association of Internal Revenue Employees has hailed the Commissioner's actions as setting a precedent which can be cited by IRS employees when taking deductions for expenses incurred in attending NAIRE conventions." CCH Standard Federal Tax Reports No. 23, April 19, 1961, pt. 1, p. 2.

It is odd, indeed, that revenue agents need make no accounting of the movies they saw or the nightclubs they attended, in order to get the deduction, while insurance agents must.

III.

The wife's expenses [3] are, on this record, also deductible. The Treasury Regulations state in § 1.162–2 (c):

> "Where a taxpayer's wife accompanies him on a business trip, expenses attributable to her travel are

[3] For reasons not germane to the problems of the federal income tax, the New York Superintendent of Insurance has ruled that the payment of a wife's expenses in attending an insurance convention

> not deductible unless it can be adequately shown that the wife's presence on the trip has a bona fide business purpose. The wife's performance of some incidental service does not cause her expenses to qualify as deductible business expenses. The same rules apply to any other members of the taxpayer's family who accompany him on such a trip."

The civil law philosophy, expressed in the community property concept, attributes half of the husband's earnings to the wife—an equitable idea that at long last was reflected in the idea of income splitting under the federal income tax law.[4] The wife's contribution to the business productivity of the husband in at least some activities is well known. It was specially recognized in the insurance field long before the issue of deductibility of her expenses arose under the federal income tax.[5] Business reasons

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is not permissible. N. Y. Ins. Dept. Rulings (1953), Oct. 6, 1953. And see 27 McKinney's Con. Laws of N. Y., § 213, subdivisions 7 and 8, regulating insurance agents' competitions.

[4] See H. R. Rep. No. 1274, 80th Cong., 2d Sess., pp. 1, 47.

[5] "Today an ever increasing number of wives take a real interest in what their husbands do, and this interest is frequently referred to by men as being of very great value to them. In fact, it has been said that a wife can not usually be so wholly lacking in contact with her husband's work as to have no influence at all upon it.

"In many cases, this influence is negative rather than positive, and this is particularly true in the careers of many life insurance agents because their work frequently involves evening appointments—a condition usually resented by a wife. Many a wife has thoroughly discouraged her husband because the only thing which she ever knew about his work was that he had to go out at night or that he had failed to 'write that ten' which would give her a new dress. She knew nothing about the bigger things which life insurance accomplishes and of which her husband was or could be a part. The recognition of the very great desirability of 'selling' the wife on her husband's job has spread rapidly in recent years, and today many husbands are helped over the rough spots of their career by the enthusiasm and vision of their wives, much of which can be aroused or increased at a convention." Report No. 15, *supra* note 2, pp. 25–26.

motivated the inclusion of wives in this particular insurance convention. An insurance executive testified at this trial:

"Q. I hand you Plaintiff's Exhibit 15, and you will notice it is a letter addressed to 'John Doe'; also a bulletin entitled 'A New Partner Has Been Formed.'

"Will you tell us what that consists of?

"A. This is a letter addressed to the wife of an agent, a new agent, as we make the contract with him. This letter is sent to his wife within a few days after the contract, enclosing this booklet explaining to her how she can help her husband in the life insurance business.

. . . . .

"Q. Please tell us, as briefly as you can and yet in detail, how you as agency director for Southland attempt to integrate the wives' performance with the performance of agents in the life insurance business.

"A. One of the important functions we have in mind is the attendance at these conventions. In addition to that communication, occasionally there are letters that will be written to the wife concerning any special sales effort that might be desired or promoted. The company has a monthly publication for the agents and employees that is mailed to their homes so the wife will have a convenient opportunity to see the magazine and read it.

"At most of our convention program[s], we have some specific reference to the wife's work, and in quite a few of the convention programs we have had wives appear on the program.

"Q. Suppose you didn't have the wives and didn't seek to require their attendance at a convention, would there be some danger that your meetings

and conventions would kind of degenerate into stag affairs, where the whole purpose of the meeting would be lost?

"A. I think that would definitely be a tendency."

I would reverse the judgments below and leave insurance conventions in the same category as conventions of revenue agents, lawyers, doctors, business men, accountants, nurses, clergymen and all others, until and unless Congress decides otherwise.

GRUMMAN *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 436. Argued April 19, 1962.—Decided June 18, 1962.

Judgment reversed on the authority of *Russell* v. *United States*, 369 U. S. 749.

Reported below: 111 U. S. App. D. C. 79, 294 F. 2d 708.

David Rein argued the cause for petitioner. With him on the briefs was *Joseph Forer*.

Bruce J. Terris argued the cause for the United States. With him on the brief were *Solicitor General Cox*, *Assistant Attorney General Yeagley* and *Kevin T. Maroney*.

PER CURIAM.

The judgment is reversed. *Russell* v. *United States*, 369 U. S. 749.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Russell* v. *United States*, 369 U. S. 749, 779, 781.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE WHITE took no part in the decision of this case.

KANSAS CITY SOUTHERN RAILWAY CO. *v.* REILY, COLLECTOR OF REVENUE OF LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 918. Decided June 18, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 242 La. 235, 135 So. 2d 915.

W. Scott Wilkinson, Milton W. Schober and *Pike Hall, Jr.* for appellant.

Emmett E. Batson for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. See *National Leather Co.* v. *Massachusetts,* 277 U. S. 413.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

CEPERO *v.* PUERTO RICO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1336, Misc. Decided June 18, 1962.

PER CURIAM.

The appeal is dismissed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

VALENZUELA *v.* EYMAN, WARDEN, ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 1144, Misc. Decided June 18, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

PATSKAN *v.* BUCHKOE, WARDEN, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 1262, Misc. Decided June 18, 1962.

Appeal dismissed.

Reported below: 296 F. 2d 724.

PER CURIAM.

The appeal is dismissed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

HALL *v.* HEARD, ACTING CORRECTIONS DIRECTOR.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1269, Misc. Decided June 18, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

WILBUR *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 1383, Misc. Decided June 18, 1962.

Appeal dismissed.

Appellant *pro se.*

Solicitor General Cox for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MILUTIN *v.* BOUCHARD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 782. Decided June 18, 1962.

Certiorari granted; judgment of the Court of Appeals vacated; case remanded to the District Court with instructions.

Reported below: 299 F. 2d 50.

Alfred W. Charles for petitioner.

Solicitor General Cox for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Third Circuit is vacated and the case is remanded to the United States District Court for the District of New Jersey with instructions to remand it to the Immigration and Naturalization Service with directions to reopen the proceeding and to afford petitioner an opportunity to seek relief under § 243 (h) of the Immigration and Nationality Act of 1952 pursuant to the procedures established by the currently applicable regulations as suggested by the Solicitor General.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

SEELIG *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 841, Misc. Decided June 18, 1962.

Certiorari granted; judgment vacated and case remanded for reconsideration in the light of *Ellis* v. *United States,* 356 U. S. 674, and *Coppedge* v. *United States,* 369 U. S. 438.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene and *Howard A. Glickstein* for the United States.

PER CURIAM.

In accordance with the suggestion of the Solicitor General and upon consideration of the entire record, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for reconsideration in the light of *Ellis* v. *United States,* 356 U. S. 674, and *Coppedge* v. *United States,* 369 U. S. 438.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

BROWN SHOE CO., INC., *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 4. Argued December 6, 1961.—Decided June 25, 1962.

The Government brought suit to enjoin consummation of a merger of two corporations, on the ground that its effect might be substantially to lessen competition or to tend to create a monopoly in the production, distribution and sale of shoes, in violation of § 7 of the Clayton Act, as amended in 1950. The District Court found that the merger would increase concentration in the shoe industry, both in manufacturing and retailing, eliminate one of the corporations as a substantial competitor in the retail field, and establish a manufacturer-retailer relationship which would deprive all but the top firms in the industry of a fair opportunity to compete, and that, therefore, it probably would result in a further substantial lessening of competition and an increased tendency toward monopoly. It enjoined appellant from having or acquiring any further interest in the business, stock, or assets of the other corporation, required full divestiture by appellant of the other corporation's stock and assets, and ordered appellant to propose in the immediate future a plan for carrying into effect the Court's order of divestiture. *Held:* The judgment is affirmed. Pp. 296–346.

1. The District Court's judgment was a "final" judgment within the meaning of § 2 of the Expediting Act, and this Court has jurisdiction of this direct appeal under that Act. Pp. 304–311.

2. The legislative history of the 1950 amendments to § 7 of the Clayton Act indicates that Congress provided no definite quantitative or qualitative tests by which enforcement agencies were to gauge the effects of a given merger, but rather that Congress intended that a variety of economic and other factors be considered in determining whether the merger was consistent with maintaining competition in the industry in which the merging companies operated. Pp. 311–323.

3. The record supports the District Court's findings and its conclusion that the shoe industry is being subjected to a cumulative series of vertical mergers which, if left unchecked, may substantially lessen competition, within the meaning of § 7, as amended. Pp. 323–334.

(a) The record in this case supports the District Court's finding that the relevant lines of commerce are men's, women's and children's shoes. Pp. 325–326.

(b) The District Court properly found that the predominantly medium-priced shoes which appellant manufactures do not occupy a product market different from the predominantly low-priced shoes which the other corporation sells. P. 326.

(c) In defining the product market, the District Court was not required to employ finer "price/quality" or "age/sex" distinctions than those recognized by its classifications of "men's," "women's" and "children's" shoes. Pp. 326–328.

(d) Insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation, and the anti-competitive effects of the merger are to be measured within that range of distribution. P. 328.

(e) The trend toward vertical integration in the shoe industry, when combined with appellant's avowed policy of forcing its own shoes upon its retail subsidiaries, seems likely to foreclose competition from a substantial share of the markets for men's, women's and children's shoes, without producing any countervailing competitive, economic or social advantages. Pp. 328–334.

4. The District Court was correct in concluding that this merger may tend to lessen competition substantially in the retail sale of men's, women's and children's shoes in the overwhelming majority of the cities and their environs in which both corporations sell through owned or controlled outlets. Pp. 334–346.

(a) The District Court correctly defined men's, women's and children's shoes as the relevant lines of commerce in which to analyze the horizontal aspects of the merger. P. 336.

(b) The District Court properly defined the relevant geographic markets in which to analyze the horizontal aspects of this merger as those cities with populations exceeding 10,000 and their environs in which both corporations retailed shoes through their own or controlled outlets. Pp. 336–339.

(c) The evidence is adequate to support the finding of the District Court that, as a result of the merger, competition in the retailing of men's, women's and children's shoes may be lessened substantially in those cities. Pp. 339–346.

179 F. Supp. 721, affirmed.

Arthur H. Dean argued the cause for appellant. With him on the briefs were *Robert H. McRoberts, Henry N. Ess III* and *Dennis C. Mahoney.*

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Loevinger, J. William Doolittle, Richard A. Solomon, Philip Marcus* and *James J. Coyle.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

I.

This suit was initiated in November 1955 when the Government filed a civil action in the United States District Court for the Eastern District of Missouri alleging that a contemplated merger between the G. R. Kinney Company, Inc. (Kinney), and the Brown Shoe Company, Inc. (Brown), through an exchange of Kinney for Brown stock, would violate § 7 of the Clayton Act, 15 U. S. C. § 18. The Act, as amended, provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

The complaint sought injunctive relief under § 15 of the Clayton Act, 15 U. S. C. § 25, to restrain consummation of the merger.

A motion by the Government for a preliminary injunction *pendente lite* was denied, and the companies were permitted to merge provided, however, that their businesses be operated separately and that their assets be kept separately identifiable. The merger was then effected on May 1, 1956.

In the District Court, the Government contended that the effect of the merger of Brown—the third largest seller of shoes by dollar volume in the United States, a leading manufacturer of men's, women's, and children's shoes, and a retailer with over 1,230 owned, operated or controlled retail outlets [1]—and Kinney—the eighth largest company, by dollar volume, among those primarily engaged in selling shoes, itself a large manufacturer of shoes, and a retailer with over 350 retail outlets—"may be substantially to lessen competition or to tend to create a monopoly" by eliminating actual or potential competition in the production of shoes for the national wholesale shoe market and in the sale of shoes at retail in the Nation, by foreclosing competition from "a market represented by Kinney's retail outlets whose annual sales exceed $42,000,000," and by enhancing Brown's competitive advantage over other producers, distributors and sellers of shoes. The Government argued that the "line of commerce" affected by this merger is "footwear," or alternatively, that the "line[s]" are "men's," "women's," and "children's" shoes, separately considered, and that the "section of the country," within which the anticompetitive effect of the merger is to be judged, is the Nation as a whole, or alternatively, each separate city or city and its

[1] Of these over 1,230 outlets under Brown's control at the time of the filing of the complaint, Brown owned and operated over 470, while over 570 were independently owned stores operating under the Brown "Franchise Program" and over 190 were independently owned outlets operating under the "Wohl Plan." A store operating under the Franchise Program agrees not to carry competing lines of shoes of other manufacturers in return for certain aid from Brown; a store under the Wohl Plan similarly agrees to concentrate its purchases on lines which Brown sells through Wohl in return for credit and merchandising aid. See note 66, *infra*. In addition, Brown shoes were sold through numerous retailers operating entirely independently of Brown.

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immediate surrounding area in which the parties sell shoes at retail.

In the District Court, Brown contended that the merger would be shown not to endanger competition if the "line[s] of commerce" and the "section[s] of the country" were properly determined. Brown urged that not only were the age and sex of the intended customers to be considered in determining the relevant line of commerce, but that differences in grade of material, quality of workmanship, price, and customer use of shoes resulted in establishing different lines of commerce. While agreeing with the Government that, with regard to manufacturing, the relevant geographic market for assessing the effect of the merger upon competition is the country as a whole, Brown contended that with regard to retailing, the market must vary with economic reality from the central business district of a large city to a "standard metropolitan area" [2] for a smaller community. Brown further contended that, both at the manufacturing level and at the retail level, the shoe industry enjoyed healthy competition and that the vigor of this competition would not, in any event, be diminished by the proposed merger because Kinney manufactured less than 0.5% and retailed less than 2% of the Nation's shoes.

The District Court rejected the broadest contentions of both parties. The District Court found that "there is one group of classifications which is understood and recog-

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[2] "The general concept adopted in defining a standard metropolitan area [is] that of an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area. . . . Each area (except in New England) consists of one or more entire counties. In New England, metropolitan areas have been defined on a town basis rather than a county basis." II U. S. Bureau of the Census, United States Census of Business: 1954, p. 3.

nized by the entire industry and the public—the classification into 'men's,' 'women's' and 'children's' shoes separately and independently." On the other hand, "[t]o classify shoes as a whole could be unfair and unjust; to classify them further would be impractical, unwarranted and unrealistic."

Realizing that "the areas of effective competition for retailing purposes cannot be fixed with mathematical precision," the District Court found that "when determined by economic reality, for retailing, a 'section of the country' is a city of 10,000 or more population and its immediate and contiguous surrounding area, regardless of name designation, and in which a Kinney store and a Brown (operated, franchise, or plan)[3] store are located."

The District Court rejected the Government's contention that the combining of the manufacturing facilities of Brown and Kinney would substantially lessen competition in the production of men's, women's, or children's shoes for the national wholesale market. However, the District Court did find that the likely foreclosure of other manufacturers from the market represented by Kinney's retail outlets may substantially lessen competition in the manufacturers' distribution of "men's," "women's," and "children's" shoes, considered separately, throughout the Nation. The District Court also found that the merger may substantially lessen competition in retailing alone in "men's," "women's," and "children's" shoes, considered separately, in every city of 10,000 or more population and its immediate surrounding area in which both a Kinney and a Brown store are located.

Brown's contentions here differ only slightly from those made before the District Court. In order fully to understand and appraise these assertions, it is necessary to set

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[3] See note 1, *supra*.

out in some detail the District Court's findings concerning the nature of the shoe industry and the place of Brown and Kinney within that industry.

The Industry.

The District Court found that although domestic shoe production was scattered among a large number of manufacturers, a small number of large companies occupied a commanding position. Thus, while the 24 largest manufacturers produced about 35% of the Nation's shoes, the top 4—International, Endicott-Johnson, Brown (including Kinney) and General Shoe—alone produced approximately 23% of the Nation's shoes or 65% of the production of the top 24.

In 1955, domestic production of nonrubber shoes was 509.2 million pairs, of which about 103.6 million pairs were men's shoes, about 271 million pairs were women's shoes, and about 134.6 million pairs were children's shoes.[4] The District Court found that men's, women's, and children's shoes are normally produced in separate factories.

The public buys these shoes through about 70,000 retail outlets, only 22,000 of which, however, derive 50% or more of their gross receipts from the sale of shoes and are classified as "shoe stores" by the Census Bureau.[5] These

[4] U. S. Bureau of Census, Facts for Industry, Production, by Kind of Footwear: 1956 and 1955, Table 1, Production Series M31A–06, introduced as Defendant's Exhibit MM. The term "nonrubber shoes" includes leather shoes, sandals and play shoes, but excludes canvas-upper, rubber-soled shoes, athletic shoes and slippers. *Ibid.*

[5] These figures are based on the 1954 Census of Business. For that enumeration, the Census Bureau classification "shoe stores" included separately operated leased shoe departments of general stores, as distinguished from the shoe departments of general stores operated only as sections of the latter's general business. U. S. Bureau of Census, Retail Trade, Single Units and Multiunits, BC58–RS3, p. I. As described, *infra*, Brown operated numerous leased shoe departments in general stores which would be included in the Census Bureau's total of "shoe stores."

22,000 shoe stores were found generally to sell (1) men's shoes only, (2) women's shoes only, (3) women's and children's shoes, or (4) men's, women's, and children's shoes.

The District Court found a "definite trend" among shoe manufacturers to acquire retail outlets. For example, International Shoe Company had no retail outlets in 1945, but by 1956 had acquired 130; General Shoe Company had only 80 retail outlets in 1945 but had 526 by 1956; Shoe Corporation of America, in the same period, increased its retail holdings from 301 to 842; Melville Shoe Company from 536 to 947; and Endicott-Johnson from 488 to 540. Brown, itself, with no retail outlets of its own prior to 1951, had acquired 845 such outlets by 1956. Moreover, between 1950 and 1956 nine independent shoe store chains, operating 1,114 retail shoe stores, were found to have become subsidiaries of these large firms and to have ceased their independent operations.

And once the manufacturers acquired retail outlets, the District Court found there was a "definite trend" for the parent-manufacturers to supply an ever increasing percentage of the retail outlets' needs, thereby foreclosing other manufacturers from effectively competing for the retail accounts. Manufacturer-dominated stores were found to be "drying up" the available outlets for independent producers.

Another "definite trend" found to exist in the shoe industry was a decrease in the number of plants manufacturing shoes. And there appears to have been a concomitant decrease in the number of firms manufacturing shoes. In 1947, there were 1,077 independent manufacturers of shoes, but by 1954 their number had decreased about 10% to 970.[6]

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[6] U. S. Bureau of the Census, 1958 Census of Manufacturers, MC 58(2)–31A–6. By 1958, the number of independent manufacturers had decreased by another 10% to 872. *Ibid.*

Brown Shoe.

Brown Shoe was found not only to have been a participant, but also a moving factor, in these industry trends. Although Brown had experimented several times with operating its own retail outlets, by 1945 it had disposed of them all. However, in 1951, Brown again began to seek retail outlets by acquiring the Nation's largest operator of leased shoe departments, Wohl Shoe Company (Wohl), which operated 250 shoe departments in department stores throughout the United States. Between 1952 and 1955 Brown made a number of smaller acquisitions: Wetherby-Kayser Shoe Company (three retail stores), Barnes & Company (two stores), Reilly Shoe Company (two leased shoe departments), Richardson Shoe Store (one store), and Wohl Shoe Company of Dallas (not connected with Wohl) (leased shoe departments in Dallas). In 1954, Brown made another major acquisition: Regal Shoe Corporation which, at the time, operated one manufacturing plant producing men's shoes and 110 retail outlets.

The acquisition of these corporations was found to lead to increased sales by Brown to the acquired companies. Thus although prior to Brown's acquisition of Wohl in 1951, Wohl bought from Brown only 12.8% of its total purchases of shoes, it subsequently increased its purchases to 21.4% in 1952 and to 32.6% in 1955. Wetherby-Kayser's purchases from Brown increased from 10.4% before acquisition to over 50% after. Regal, which had previously sold no shoes to Wohl and shoes worth only $89,000 to Brown, in 1956 sold shoes worth $265,000 to Wohl and $744,000 to Brown.

During the same period of time, Brown also acquired the stock or assets of seven companies engaged solely in shoe manufacturing. As a result, in 1955, Brown was the

fourth largest shoe manufacturer in the country, producing about 25.6 million pairs of shoes or about 4% of the Nation's total footwear production.

Kinney.

Kinney is principally engaged in operating the largest family-style shoe store chain in the United States. At the time of trial, Kinney was found to be operating over 400 such stores in more than 270 cities. These stores were found to make about 1.2% of all national retail shoe sales by dollar volume. Moreover, in 1955 the Kinney stores sold approximately 8 million pairs of nonrubber shoes or about 1.6% of the national pairage sales of such shoes. Of these sales, approximately 1.1 million pairs were of men's shoes or about 1% of the national pairage sales of men's shoes; approximately 4.2 million pairs were of women's shoes or about 1.5% of the national pairage sales of women's shoes; and approximately 2.7 million pairs were of children's shoes or about 2% of the national pairage sales of children's shoes.[7]

In addition to this extensive retail activity, Kinney owned and operated four plants which manufactured men's, women's, and children's shoes and whose combined output was 0.5% of the national shoe production in 1955, making Kinney the twelfth largest shoe manufacturer in the United States.

Kinney stores were found to obtain about 20% of their shoes from Kinney's own manufacturing plants. At the time of the merger, Kinney bought no shoes from Brown;

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[7] Kinney's pairage sales of men's, women's, and children's shoes were extracted from exhibits submitted to the Government in response to its interrogatories. See GX 6, R. 48–53. These statistics are virtually identical to those cited in appellant's brief, with but one exception. In its internal operations, appellant classifies certain shoes as "growing girls'" shoes while the cited figures follow the Census Bureau's treatment of such shoes as "women's" shoes.

however, in line with Brown's conceded reasons [8] for acquiring Kinney, Brown had, by 1957, become the largest outside supplier of Kinney's shoes, supplying 7.9% of all Kinney's needs.

It is in this setting that the merger was considered and held to violate § 7 of the Clayton Act. The District Court ordered Brown to divest itself completely of all stock, share capital, assets or other interests it held in Kinney, to operate Kinney to the greatest degree possible as an independent concern pending complete divestiture, to refrain thereafter from acquiring or having any interest in Kinney's business or assets, and to file with the court within 90 days a plan for carrying into effect the divestiture decreed. The District Court also stated it would retain jurisdiction over the cause to enable the parties to apply for such further relief as might be necessary to enforce and apply the judgment. Prior to its submission of a divestiture plan, Brown filed a notice of appeal in the District Court. It then filed a jurisdictional statement in this Court, seeking review of the judgment below as entered.

II.

Jurisdiction.

Appellant's jurisdictional statement cites as the basis of our jurisdiction over this appeal § 2 of the Expediting

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[8] As stated in the testimony of Clark R. Gamble, President of Brown Shoe Company:

"It was our feeling, in addition to getting a distribution into the field of prices which we were not covering, it was also the feeling that as Kinney moved into the shopping centers in these free standing stores, they were going into a higher income neighborhood and they would probably find the necessity of up-grading and adding additional lines to their very successful operation that they had been doing and it would give us an opportunity we hoped to be able to sell them in that category. Besides that, it was a very successful operation and would give us a good diversified investment to stabilize our earnings." T. 1323.

Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29. In a civil antitrust action in which the United States is the complainant that Act provides for a direct appeal to this Court from "the *final* judgment of the district court." [9] (Emphasis supplied.) The Government does not contest appellant's claim of jurisdiction; on the contrary, it moved to have the judgment below summarily affirmed, conceding our present jurisdiction to review the merits of that judgment. We deferred ruling on the Government's motion for summary affirmance and noted probable jurisdiction over the appeal. 363 U. S. 825.[10]

It was suggested from the bench during the oral argument that, since the judgment of the District Court does not include a specific plan for the dissolution of the Brown-Kinney merger, but reserves such a ruling pending the filing of suggested plans for implementing divestiture, the judgment below is not "final" as contemplated by the Expediting Act. In response to that suggestion, both parties have filed briefs contending that we do have jurisdiction to dispose of the case on the merits in its present posture. However, the mere consent of the parties to the Court's consideration and decision of the case cannot, by itself, confer jurisdiction on the Court. See *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18; *People's Bank* v. *Calhoun*, 102 U. S. 256, 260–261; *Capron* v. *Van Noorden*, 2 Cranch 126, 127. Therefore, a review of the sources of the Court's jurisdiction is a threshold

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[9] Congress thus limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree. *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558.

[10] After probable jurisdiction had been noted, a joint motion of the parties to postpone oral argument on the appeal to the present Term of the Court was granted. 365 U. S. 825.

inquiry appropriate to the disposition of every case that comes before us. Revised Rules of the Supreme Court, 15 (1)(b), 23 (1)(b); *Kesler* v. *Department of Public Safety,* 369 U. S. 153; *Collins* v. *Miller,* 252 U. S. 364; *United States* v. *More,* 3 Cranch 159.

The requirement that a final judgment shall have been entered in a case by a lower court before a right of appeal attaches has an ancient history in federal practice, first appearing in the Judiciary Act of 1789.[11] With occasional modifications, the requirement has remained a cornerstone of the structure of appeals in the federal courts.[12] The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." See, *e. g., Cobbledick* v. *United States,* 309 U. S. 323, 326; *Market Street R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 552; *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 69; *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U. S. 541, 546; *DiBella* v. *United States,* 369 U. S. 121, 124, 129; cf. *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.,* 344 U. S. 206, 212; *United States* v. *Schaefer Brewing Co.,* 356 U. S. 227, 232. A pragmatic approach to the question of finality has been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action": [13] the touchstones of federal procedure.

In most cases in which the Expediting Act has been cited as the basis of this Court's jurisdiction, the issue of "finality" has not been raised or discussed by the parties or the Court. On but few occasions have particular

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[11] Section 22, 1 Stat. 84, in its present form, 28 U. S. C. § 1291.

[12] Cf. 28 U. S. C. § 1292; Fed. Rules Civ. Proc., 54 (b); 28 U. S. C. § 1651; *Ex parte United States,* 226 U. S. 420; *United States* v. *United States District Court,* 334 U. S. 258; *Beacon Theatres, Inc.,* v. *Westover,* 359 U. S. 500.

[13] Fed. Rules Civ. Proc., 1.

orders in suits to which that Act is applicable been considered in the light of claims that they were insufficiently "final" so as to preclude appeal to this Court. Compare *Schine Chain Theatres* v. *United States,* 329 U. S. 686, with *Schine Chain Theatres* v. *United States,* 334 U. S. 110. The question has generally been passed over without comment in adjudications on the merits. While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio, United States* v. *Tucker Truck Lines,* 344 U. S. 33, 38; *United States ex rel. Arant* v. *Lane,* 245 U. S. 166, 170, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.[14] Cf. *Stainback* v. *Mo*

[14] See, *e. g., United States* v. *Reading Co.,* 226 F. 229, 286 (D. C. E. D. Pa.), 1 Decrees & Judgments in Civil Federal Antitrust Cases (hereinafter cited "D. & J.") 575, 576–577, affirmed in pertinent part, 253 U. S. 26; *United States* v. *National Lead Co.,* 63 F. Supp. 513, 534–535 (D. C. S. D. N. Y.), 4 D. & J. 2846, 2851, affirmed, 332 U. S. 319; *United States* v. *Timken Roller Bearing Co.,* 83 F. Supp. 284, 318 (D. C. N. D. Ohio) [relevant portions of the decree reprinted at 341 U. S. 593, 602 n. 1], modified, 341 U. S. 593; *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 352–353, 354 (D. C. D. Mass.), affirmed, 347 U. S. 521; *United States* v. *Maryland & Virginia Milk Producers Assn.,* 167 F. Supp. 799, 809 (D. C. D. C.), affirmed, 362 U. S. 458. The Court has also approved the practice of District Courts of retaining jurisdiction in such cases for future modifications of their decrees, a practice which has also not been considered inconsistent with the finality of the original decrees. See *Associated Press* v. *United States,* 326 U. S. 1, 22–23; *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 157. But cf. *United States* v. *Schine Chain Theatres,* 63 F. Supp. 229, 241–242 (D. C. W. D. N. Y.), 2 D. &. J. 1815, modified, 334 U. S. 110; *United States* v. *Paramount Pictures,* 70 F. Supp. 53, 72, 75 (D. C. S. D. N. Y.), 2 D. & J. 1682, modified, 334 U. S. 131, revised in accordance with this Court's mandate, 85 F. Supp. 881, 898–901, 2 D. & J. 1690, affirmed *sub nom. Loew's, Inc.,* v. *United States,* 339 U. S. 974, in which review did await the entry of specific and detailed provisions for disposition of the defendants' assets.

Hock Ke Lok Po, 336 U. S. 368, 379–380; *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 125–126.

We think the decree of the District Court in this case had sufficient indicia of finality for us to hold that the judgment is properly appealable at this time. We note, first, that the District Court disposed of the entire complaint filed by the Government. Every prayer for relief was passed upon. Full divestiture by Brown of Kinney's stock and assets was expressly required. Appellant was permanently enjoined from acquiring or having any further interest in the business, stock or assets of the other defendant in the suit. The single provision of the judgment by which its finality may be questioned is the one requiring appellant to propose in the immediate future a plan for carrying into effect the court's order of divestiture. However, when we reach the merits of, and affirm, the judgment below, the sole remaining task for the District Court will be its acceptance of a plan for full divestiture, and the supervision of the plan so accepted. Further rulings of the District Court in administering its decree, facilitated by the fact that the defendants below have been required to maintain separate books *pendente lite*, are sufficiently independent of, and subordinate to, the issues presented by this appeal to make the case in its present posture a proper one for review now.[15] Appellant here does not attack the full divestiture ordered by the District Court as such; it is appellant's contention that

[15] Cf. *Forgay* v. *Conrad*, 6 How. 201; *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362; *Radio Station WOW* v. *Johnson*, 326 U. S. 120; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541. The details of the divestiture which the District Court will approve cannot affect the outcome of the basic litigation in this case, as the details of an eminent domain settlement might moot the claims of the condemnee in that type of suit. See *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62; *Grays Harbor Logging Co.* v. *Coats-Fordney Co.*, 243 U. S. 251.

under the facts of the case, as alleged and proved by the Government, *no* order of divestiture could have been proper. The propriety of divestiture was considered below and is disputed here on an "all or nothing" basis. It is ripe for review now, and will, thereafter, be foreclosed. Repetitive judicial consideration of the same question in a single suit will not occur here. Cf. *Radio Station WOW* v. *Johnson, supra,* at 127; *Catlin* v. *United States,* 324 U. S. 229, 233–234; *Cobbledick* v. *United States, supra,* at 325, 330.

A second consideration supporting our view is the character of the decree still to be entered in this suit. It will be an order of full divestiture. Such an order requires careful, and often extended, negotiation and formulation. This process does not take place in a vacuum, but, rather, in a changing market place, in which buyers and bankers must be found to accomplish the order of forced sale. The unsettling influence of uncertainty as to the affirmance of the initial, underlying decision compelling divestiture would only make still more difficult the task of assuring expeditious enforcement of the antitrust laws. The delay in withholding review of any of the issues in the case until the details of a divestiture had been approved by the District Court and reviewed here could well mean a change in market conditions sufficiently pronounced to render impractical or otherwise unenforceable the very plan of asset disposition for which the litigation was held. The public interest, as well as that of the parties, would lose by such procedure.

Lastly, holding the decree of the District Court in the instant case less than "final" and, thus, not appealable, would require a departure from a settled course of the Court's practice. It has consistently reviewed antitrust decrees contemplating either future divestiture or other comparable remedial action prior to the formulation and

entry of the precise details of the relief ordered. No instance has been found in which the Court has reviewed a case following a divestiture decree such as the one we are asked to consider here, in which the party subject to that decree has later brought the case back to this Court with claims of error in the details of the divestiture finally approved.[16] And only two years ago, we were unanimous in accepting jurisdiction, and in affirming the judgment of a District Court similar to the one entered here, in the only case under amended § 7 of the Clayton Act brought before us at a juncture comparable to the instant litigation. See *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, 472–473.[17] A fear of piecemeal appeals because of our adherence to existing procedure can find no support in history. Thus, the substantial body

[16] The Court has, of course, occasionally reviewed varying facets of single antitrust cases on separate appeals. However, such cases are distinguishable from the situation at bar. Thus, one group includes cases in which the Government first sought appellate review from dismissals of its complaints, whereafter the Court considered the orders entered on remand. *E. g., United States* v. *Terminal R. Assn. of St. Louis,* 224 U. S. 383; 236 U. S. 194; *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586; 366 U. S. 316. Another group includes cases in which the Government appealed from what it considered to be inadequate decrees, in which the Court later considered the further relief ordered on remand. *E. g., United States* v. *Reading Co.,* 253 U. S. 26, later considered *sub nom. Continental Insurance Co.* v. *United States,* 259 U. S. 156; *United States* v. *Paramount Pictures,* 334 U. S. 131, later considered *sub nom. Loew's, Inc.,* v. *United States,* 339 U. S. 974. And appeals in which the details of a divestiture were made a primary issue have followed the entry of such orders upon the filing of consent decrees, in which the underlying requirements of divestiture were never previously presented. *E. g., Swift & Co.* v. *United States,* 276 U. S. 311; *United States* v. *Swift & Co.,* 286 U. S. 106; *Chrysler Corp.* v. *United States,* 316 U. S. 556; *Ford Motor Co.* v. *United States,* 335 U. S. 303. Cf. *International Harvester Co.* v. *United States,* 248 U. S. 587; 274 U. S. 693.

[17] Cf. *Jerrold Electronics Corp.* v. *United States,* 365 U. S. 567, affirming 187 F. Supp. 545, 563–567 (D. C. E. D. Pa.).

of precedent for accepting jurisdiction over this case in its present posture supports the practical considerations previously discussed. We believe a contrary result would be inconsistent with the very purposes for which the Expediting Act was passed and that gave it its name.

III.

Legislative History.

This case is one of the first to come before us in which the Government's complaint is based upon allegations that the appellant has violated § 7 of the Clayton Act, as that section was amended in 1950.[18] The amendments adopted in 1950 culminated extensive efforts over a number of years, on the parts of both the Federal Trade Commission and some members of Congress, to secure revision of a section of the antitrust laws considered by many observers to be ineffective in its then existing form. Sixteen bills to amend § 7 during the period 1943 to 1949

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[18] Material in italics was added by the amendments; material in brackets was deleted. "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be [to] substantially *to* lessen competition [between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community], or *to* tend to create a monopoly [of any line of commerce]." Other paragraphs of § 7 were also amended in details not relevant to this case. The only other cases to reach this Court, in which the Government's complaints were based, in part, on amended § 7, were *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, and *Jerrold Electronics Corp.* v. *United States,* 365 U. S. 567. However, a detailed analysis of the scope and purposes of the 1950 amendments was unnecessary to our disposition of the issues raised in those cases.

alone were introduced for consideration by the Congress, and full public hearings on proposed amendments were held in three separate sessions.[19] In the light of this extensive legislative attention to the measure, and the broad, general language finally selected by Congress for the expression of its will, we think it appropriate to review the history of the amended Act in determining whether the judgment of the court below was consistent with the intent of the legislature. See *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 591–592; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 390–395; *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 43–46, 49; *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 734–737.

As enacted in 1914, § 7 of the original Clayton Act prohibited the acquisition by one corporation of the *stock* of another corporation when such acquisition would result in a substantial lessening of competition *between the acquiring and the acquired* companies, or tend to

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[19] S. 2277, 67th Cong., 1st Sess. (1921); H. R. 7371, S. 2549, 75th Cong., 1st Sess. (1937); H. R. 10176, S. 3345, 75th Cong., 2d Sess. (1938); H. R. 1517, S. 577, 78th Cong., 1st Sess. (1943); H. R. 2357, H. R. 4519, H. R. 4810, S. 615, 79th Cong., 1st Sess. (1945); H. R. 5535, 79th Cong., 2d Sess. (1946); H. R. 515, H. R. 3736, S. 104, 80th Cong., 1st Sess. (1947); H. R. 7024, 80th Cong., 2d Sess. (1948); H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734, S. 56, 81st Cong., 1st Sess. (1949).

Public hearings were held on H. R. 2357, 79th Cong., 1st Sess. (1945); S. 104, 80th Cong., 1st Sess. (1947); H. R. 515, 80th Cong., 1st Sess. (1947), and H. R. 2734, 81st Cong., 1st Sess. (1949–1950).

For reviews of the legislative history of the amendments, see Notes, 52 Col. L. Rev. 766 (1952); 46 Ill. L. Rev. 444 (1951); Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 233–238 (1960); Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Col. L. Rev. 629, 652–674 (1961); Martin, Mergers and the Clayton Act 221–310 (1959).

create a monopoly in any line of commerce. The Act did not, by its explicit terms, or as construed by this Court, bar the acquisition by one corporation of the *assets* of another.[20] Nor did it appear to preclude the acquisition of stock in any corporation other than a direct competitor.[21] Although proponents of the 1950 amendments to the Act suggested that the terminology employed in these provisions was the result of accident or an unawareness that the acquisition of assets could be as inimical to competition as stock acquisition, a review of the legislative history of the original Clayton Act fails to support such views.[22] The possibility of asset acquisition was discussed,[23] but was not considered impor-

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[20] See *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Comm'n*, 291 U. S. 587; *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U. S. 554. See also *United States* v. *Celanese Corp.*, 91 F. Supp. 14 (D. C. S. D. N. Y.); 1 F. T. C. 541–542; 33 Op. Atty. Gen. 225, 241.

[21] This was the manner in which the Federal Trade Commission had viewed the prohibitions of original § 7. See F. T. C. Ann. Rep. 6–7 (1929); Statement by General Counsel Kelley in Hearings before Subcommittee 3 of the House Committee on the Judiciary on H. R. 2734, 81st Cong., 1st Sess. (hereinafter cited as H. R. Hearings on H. R. 2734) 38. However, we have held, since the adoption of the 1950 amendments, that such a construction of § 7 was incorrect. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586.

[22] For expressions of this questionable view of the background of the original Act see F. T. C., The Merger Movement: A Summary Report 2 (1948); testimony of then Representative Kefauver, in Hearings before Subcommittee 2 of the House Committee on the Judiciary on H. R. 515, 80th Cong., 1st Sess. (hereinafter cited as Hearings on H. R. 515) 4–5; remarks of Senator O'Mahoney, 96 Cong. Rec. 16443; H. R. Rep. No. 1191, 81st Cong., 1st Sess. 4–5. For a critique of this understanding of the Act see *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 613–615 (dissent), and reviews cited in note 19, *supra*.

[23] See 51 Cong. Rec. 14255, 14316, 14456–14457 (remarks of Senators Chilton, Cummins, Colt, Reed). An amendment offered during the Senate's floor debate by Senator Cummins would have precluded the acquisition by one corporation of the stock "or any other means

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tant to an Act then conceived to be directed primarily at the development of holding companies and at the secret acquisition of competitors through the purchase of all or parts of such competitors' stock.[24]

It was, however, not long before the Federal Trade Commission recognized deficiencies in the Act as first enacted. Its Annual Reports frequently suggested amendments, principally along two lines: first, to "plug the loophole" exempting asset acquisitions from coverage under the Act, and second, to require companies proposing a merger to give the Commission prior notification of their plans.[25] The Final Report of the Temporary National Economic Committee also recommended changes focusing on these two proposals.[26] Hearings were held on some bills incorporating either or both of these changes but, prior to the amendments adopted in 1950, none reached the floor of Congress for plenary consideration. Although the bill that was eventually to become amended § 7 was confined to embracing within the Act's terms the

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of control or participation in the control" of two or more other corporations carrying on business of the same kind or competitive in character. The amendment was not directed at asset acquisitions specifically and was, in any event, overwhelmingly defeated. 51 Cong. Rec. 14315, 14473–14476.

[24] See 51 Cong. Rec. 9073–9074, 9271, 14226, 14254, 14316, 14420, 14465–14466 (remarks of Representatives Webb and Carlin and Senators Reed, Cummins and Poindexter); H. R. Rep. No. 627, 63d Cong., 2d Sess. 17; S. Rep. No. 698, 63d Cong., 2d Sess. 13.

[25] See F. T. C. Ann. Rep. for 1928, 19; *id.* for 1929, at 6, 59; *id.* for 1930, at 50–51; *id.* for 1935, at 16, 48; *id.* for 1936, at 48; *id.* for 1937, at 15; *id.* for 1938, at 11, 19, 29; *id.* for 1939, at 14, 16; *id.* for 1940, at 12–13; *id.* for 1941, at 19–20; *id.* for 1942, at 9; *id.* for 1943, at 9; *id.* for 1944, at 8; *id.* for 1945, at 8–9; *id.* for 1946, at 12; *id.* for 1947, at 12; *id.* for 1948, at 11, 16. The Commission has continued unsuccessfully to urge adoption of the prior notification provision. See *id.* for 1958, at 7; *id.* for 1960, at 12.

[26] Temporary National Economic Committee, Final Report and Recommendations, S. Doc. No. 35, 77th Cong., 1st Sess. 38–40 (1941).

acquisition of assets as well as stock, in the course of the hearings conducted in both the Eightieth and Eighty-first Congresses, a more far-reaching examination of the purposes and provisions of § 7 was undertaken. A review of the legislative history of these amendments provides no unmistakably clear indication of the precise standards the Congress wished the Federal Trade Commission and the courts to apply in judging the legality of particular mergers. However, sufficient expressions of a consistent point of view may be found in the hearings, committee reports of both the House and Senate and in floor debate to provide those charged with enforcing the Act with a usable frame of reference within which to evaluate any given merger.

The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. Apprehension in this regard was bolstered by the publication in 1948 of the Federal Trade Commission's study on corporate mergers. Statistics from this and other current studies were cited as evidence of the danger to the American economy in unchecked corporate expansions through mergers.[27] Other considerations cited in support of the bill were the desir-

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[27] F. T. C., The Present Trend of Corporate Mergers and Acquisitions, reprinted in Hearings on H. R. 515, at 300–317; F. T. C., The Merger Movement: A Summary Report, *passim;* 95 Cong. Rec. 11500–11507; 96 Cong. Rec. 16433, 16444, 16457; S. Rep. No. 1775, 81st Cong., 2d Sess. 3. The House Report on the amendments summarized its view of the situation:

"That the current merger movement [during the years 1940–1947] has had a significant effect on the economy is clearly revealed by the fact that the asset value of the companies which have disappeared through mergers amounts to 5.2 billion dollars, or no less than 5.5 percent of the total assets of all manufacturing corporations—a significant segment of the economy to be swallowed up in such a short period of time." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 3.

ability of retaining "local control" over industry and the protection of small businesses.[28] Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat to other values a trend toward concentration was thought to pose.

What were some of the factors, relevant to a judgment as to the validity of a given merger, specifically discussed by Congress in redrafting § 7?

First, there is no doubt that Congress did wish to "plug the loophole" and to include within the coverage of the Act the acquisition of assets no less than the acquisition of stock.[29]

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[28] See, *e. g.*, 95 Cong. Rec. 11486, 11489, 11494–11495, 11498; 96 Cong. Rec. 16444, 16448, 16450, 16452, 16503 (remarks by the cosponsors of the amendments, Representative Celler and Senator Kefauver, and by Representatives Bryson, Keating and Patman and Senators Murray and Aiken). Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (C. A. 2d Cir., per Learned Hand, J.): "Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."

[29] Virtually every member of Congress who spoke in support of the amendments, indicated that this aspect of the legislation was its salient characteristic. Representative Kefauver, one of the Act's sponsors, testified, "The bill is not complicated. It proposes simply to plug the loophole in sections 7 and 11 of the Clayton Act." Hearings on H. R. 515, at 4. The Senate Report on the measure finally adopted summarized the "Purpose" of the amendment with this single paragraph:

"The purpose of the proposed legislation is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder [*sic*] the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." S. Rep. No. 1775, 81st Cong., 2d Sess. 2.

Second, by the deletion of the "acquiring-acquired" language in the original text,[30] it hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.[31]

Third, it is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power

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[30] The deletion of the "acquiring-acquired" test was the direct result of an amendment offered by the Federal Trade Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying "rule of reason," was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings on H. R. 515, at 23, 117–119, 238–240, 259; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2734, 81st Cong., 1st Sess. (hereinafter cited as S. Hearings on H. R. 2734) 147.

[31] That § 7 was intended to apply to all mergers—horizontal, vertical or conglomerate—was specifically reiterated by the House Report on the final bill. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. And see note 21, *supra*.

to brake this force at its outset and before it gathered momentum.[32]

Fourth, and closely related to the third, Congress rejected, as inappropriate to the problem it sought to remedy, the application to § 7 cases of the standards for judging the legality of business combinations adopted by the courts in dealing with cases arising under the Sherman Act, and which may have been applied to some early cases arising under original § 7.[33]

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[32] That § 7 of the Clayton Act was intended to reach incipient monopolies and trade restraints outside the scope of the Sherman Act was explicitly stated in the Senate Report on the original Act. S. Rep. No. 698, 63d Cong., 2d Sess. 1. See *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589. This theme was reiterated in congressional consideration of the amendments adopted in 1950, and found expression in the final House and Senate Reports on the measure. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8 ("Acquisitions of stock or assets have a cumulative effect, and control of the market . . . may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition."); S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5 ("The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."). And see F. T. C., The Merger Movement: A Summary Report 6–7.

[33] The Report of the House Judiciary Committee on H. R. 515 recommended the adoption of tests more stringent than those in the Sherman Act. H. R. Rep. No. 596, 80th Cong., 1st Sess. 7. A vigorous minority thought no new legislation was needed. *Id.*, at 11–18. Between the issuance of this Report and the Committee's subsequent consideration of H. R. 2734, this Court had decided *United States* v. *Columbia Steel Co.*, 334 U. S. 495, which some understood to indicate that existing law might be inadequate to prevent mergers that had substantially lessened competition in a section of the country, but which, nevertheless, had not risen to the level of those restraints of trade or monopoly prohibited by the Sherman Act. See 96 Cong. Rec. 16502 (remarks of Senator Kefauver);

Fifth, at the same time that it sought to create an effective tool for preventing all mergers having demonstrable anticompetitive effects, Congress recognized the stimulation to competition that might flow from particular mergers. When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market.[34]

H. R. Rep. No. 1191, 81st Cong., 1st Sess. 10–11. Numerous other statements by Congressmen and Senators and by representatives of the Federal Trade Commission, the Department of Justice and the President's Council of Economic Advisors were made to the Congress suggesting that a standard of illegality stricter than that imposed by the Sherman Act was needed. See, *e. g.*, H. R. Hearings on H. R. 2734, at 13, 29, 41, 117; S. Hearings on H. R. 2734, at 22, 23, 47, 66, 319. The House Judiciary Committee's 1949 Report supported this concept unanimously although five of the nine members who had dissented two years earlier in H. R. Rep. No. 596 were still serving on the Committee. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 7–8. The Senate Report was explicit: "The committee wish to make it clear that the bill is not intended to revert to the Sherman Act test. The intent here . . . is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding. . . . [The] various additions and deletions—some strengthening and others weakening the bill—are not conflicting in purpose and effect. They merely are different steps toward the same objective, namely, that of framing a bill which, though dropping portions of the so-called Clayton Act test that have no economic significance [the reference would appear to be primarily to the "acquiring-acquired" standard of the original Act], reaches far beyond the Sherman Act." S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5.

[34] As to small company mergers, see H. R. Hearings on H. R. 2734, at 41, 117; S. Hearings on H. R. 2734, at 6, 51; 95 Cong. Rec. 11486, 11488, 11506; 96 Cong. Rec. 16436; H. R. Rep. No. 1191, 81st Cong.,

The deletion of the word "community" in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant "section" of the country.[35] Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.

Sixth, Congress neither adopted nor rejected specifically any particular tests for measuring the relevant markets, either as defined in terms of product or in terms of geographic locus of competition, within which the anti-

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1st Sess. 6–8; S. Rep. No. 1775, 81st Cong., 2d Sess. 4. As to mergers with failing companies, see S. Hearings on H. R. 2734, at 115, 134–135, 198; 96 Cong. Rec. 16435, 16444; H. R. Rep. No. 1191, *supra,* at 6; S. Rep. No. 1775, *supra,* at 7.

[35] The Federal Trade Commission's amendment, see note 30, *supra,* included the phrase "where . . . in any section, community, or trade area, there is reasonable probability that the effect of such acquisition may be to substantially lessen competition." Congressman Kefauver urged deletion of the word "community" on the ground that it might suggest, for example, that a merger between two small filling stations in a section of a city was proscribed. Hearings on H. R. 515, at 260. And see also 96 Cong. Rec. 16453. The fear of literal prohibition of all but *de minimis* mergers through the use of the word "community" was also cited by the Senate Report as the basis for its retention solely of the word "section." S. Rep. No. 1775, 81st Cong., 2d Sess. 4. The reference to "trade area" was deleted as redundant, when it became clear that the "section" of the country to which the Act was to apply, referred not to a definite geographic area of the country, but rather the geographic area of effective competition in the relevant line of commerce. See S. Hearings on H. R. 2734, at 38–52, 66–84, 101–102, 132, 133, 144, 145; H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8; S. Rep. No. 1775, 81st Cong., 2d Sess. 4, 5–6. The Senate Report cited with approval the definition of the market employed by the Court in *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 299 n. 5.

competitive effects of a merger were to be judged. Nor did it adopt a definition of the word "substantially," whether in quantitative terms of sales or assets or market shares or in designated qualitative terms, by which a merger's effects on competition were to be measured.[36]

Seventh, while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular

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[36] The House Report on H. R. 2734 stated that two tests of illegality were included in the proposed Act: whether the merger substantially lessened competition or tended to create a monopoly. It stated that such effects could be perceived through findings, for example, that a whole or material part of the competitive activity of an enterprise, which had been a substantial factor in competition, had been eliminated; that the relative size of the acquiring corporation had increased to such a point that its advantage over competitors threatened to be "decisive"; that an "undue" number of competing enterprises had been eliminated; or that buyers and sellers in the relevant market had established relationships depriving their rivals of a fair opportunity to compete. H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Each of these standards, couched in general language, reflects a conscious avoidance of exclusively mathematical tests even though the case of *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, said to have created a "quantitative substantiality" test for suits arising under § 3 of the Clayton Act, was decided while Congress was considering H. R. 2734. Some discussion of the applicability of this test to § 7 cases ensued, see, *e. g.*, S. Hearings on H. R. 2734, at 31–32, 169–172; S. Rep. No. 1775, 81st Cong., 2d Sess. 21; 96 Cong. Rec. 16443, but this aspect of the *Standard Oil* decision was neither specifically endorsed nor impugned by the bill's supporters. However, the House Judiciary Committee's Report, issued two months after *Standard Oil* had been decided, remarked that the tests of illegality under the new Act were intended to be "similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8.

industry.[37] That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account.[38]

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[37] A number of the supporters of the amendments voiced their concern that passage of the bill would amount to locking the barn door after most of the horses had been stolen, but urged approval of the measure to prevent the theft of those still in the barn. Which was to say that, if particular industries had not yet been subject to the congressionally perceived trend toward concentration, adoption of the amendments was urged as a way of preventing the trend from reaching those industries as yet unaffected. See, *e. g.*, 95 Cong. Rec. 11489, 11494, 11498 (remarks of Representatives Keating, Yates, Patman); 96 Cong. Rec. 16444 (remarks of Senators O'Mahoney, Murray).

[38] Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger. See, *e. g.*, *Pillsbury Mills, Inc.*, 50 F. T. C. 555; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (D. C. S. D. N. Y.); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (D. C. E. D. Pa.), aff'd, 365 U. S. 567. And see U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 126 (1955).

Eighth, Congress used the words "*may be* substantially to lessen competition" (emphasis supplied), to indicate that its concern was with probabilities, not certainties.[39] Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

It is against this background that we return to the case before us.

IV.

The Vertical Aspects of the Merger.

Economic arrangements between companies standing in a supplier-customer relationship are characterized as "vertical." The primary vice of a vertical merger or other arrangement tying a customer to a supplier is that,

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[39] In the course of both the Committee hearings and floor debate, attention was occasionally focused on the issue of whether "possible," "probable" or "certain" anticompetitive effects of a proposed merger would have to be proven to establish a violation of the Act. Language was quoted from prior decisions of the Court in antitrust cases in which each of these interpretations of the word "may" was suggested as appropriate. H. R. Hearings on H. R. 2734, at 74; S. Hearings on H. R. 2734, at 32, 33, 160–168; 96 Cong. Rec. 16453, 16502. The final Senate Report on the question was explicit on the point:

"The use of these words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [*sic*] effect . . . . The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints." S. Rep. No. 1775, 81st Cong., 2d Sess. 6. See also 51 Cong. Rec. 14464 (remarks of Senator Reed).

by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a "clog on competition," *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 314, which "deprive[s] . . . rivals of a fair opportunity to compete." [40] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Every extended vertical arrangement by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. However, the Clayton Act does not render unlawful all such vertical arrangements, but forbids only those whose effect "may be substantially to lessen competition, or to tend to create a monopoly" "in any line of commerce in any section of the country." Thus, as we have previously noted,

> "[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiality can be determined only in terms of the market affected." [41]

The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").

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[40] In addition, a vertical merger may disrupt and injure competition when those independent customers of the supplier who are in competition with the merging customer, are forced either to stop handling the supplier's lines, thereby jeopardizing the goodwill they have developed, or to retain the supplier's lines, thereby forcing them into competition with their own supplier. See *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576, 613 (D. C. S. D. N. Y.). See also GX 13, R. 215, a letter from Sam Sullivan, an independent shoe retailer, to Clark Gamble, President of Brown Shoe Co.

[41] *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 593.

The Product Market.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.[42] However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593–595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.[43] Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.[44]

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[42] The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed. Cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 510–511; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (D. C. S. D. N. Y.). However, the District Court made but limited findings concerning the feasibility of interchanging equipment in the manufacture of nonrubber footwear. At the same time, the record supports the court's conclusion that individual plants generally produced shoes in only one of the product lines the court found relevant.

[43] See generally Bock, Mergers and Markets, An Economic Analysis of Case Law 25–35 (1960).

[44] *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 592, 595; *A. G. Spalding & Bros.* v. *Federal Trade Comm'n*, 301 F. 2d 585, 603 (C. A. 3d Cir.); *American Crystal Sugar Co.* v. *Cuban-*

Applying these considerations to the present case, we conclude that the record supports the District Court's finding that the relevant lines of commerce are men's, women's, and children's shoes. These product lines are recognized by the public; each line is manufactured in separate plants; each has characteristics peculiar to itself rendering it generally noncompetitive with the others; and each is, of course, directed toward a distinct class of customers.

Appellant, however, contends that the District Court's definitions fail to recognize sufficiently "price/quality" and "age/sex" distinctions in shoes. Brown argues that the predominantly medium-priced shoes which it manufactures occupy a product market different from the predominantly low-priced shoes which Kinney sells. But agreement with that argument would be equivalent to holding that medium-priced shoes do not compete with low-priced shoes. We think the District Court properly found the facts to be otherwise. It would be unrealistic to accept Brown's contention that, for example, men's shoes selling below $8.99 are in a different product market from those selling above $9.00.

This is not to say, however, that "price/quality" differences, where they exist, are unimportant in analyzing a merger; they may be of importance in determining the likely effect of a merger. But the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists. Thus we agree with the District Court that in this case a further division of product lines based on "price/quality" differences would be "unrealistic."

American Sugar Co., 259 F. 2d 524, 527 (C. A. 2d Cir.); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603 (D. C. S. D. N. Y.). See also note 39, *supra*.

Brown's contention that the District Court's product market definitions should have recognized further "age/sex" distinctions raises a different problem. Brown's sharpest criticism is directed at the District Court's finding that children's shoes constituted a single line of commerce. Brown argues, for example, that "a little boy does not wear a little girl's black patent leather pump" and that "[a] male baby cannot wear a growing boy's shoes." Thus Brown argues that "infants' and babies' " shoes, "misses' and children's" shoes and "youths' and boys' " shoes should each have been considered a separate line of commerce. Assuming, *arguendo,* that little boys' shoes, for example, do have sufficient peculiar characteristics to constitute one of the markets to be used in analyzing the effects of this merger, we do not think that in this case the District Court was required to employ finer "age/sex" distinctions than those recognized by its classifications of "men's," "women's," and "children's" shoes. Further division does not aid us in analyzing the effects of this merger. Brown manufactures about the same percentage of the Nation's children's shoes (5.8%) as it does of the Nation's youths' and boys' shoes (6.5%), of the Nation's misses' and children's shoes (6.0%) and of the Nation's infants' and babies' shoes (4.9%). Similarly, Kinney sells about the same percentage of the Nation's children's shoes (2%) as it does of the Nation's youths' and boys' shoes (3.1%), of the Nation's misses' and children's shoes (1.9%), and of the Nation's infants' and babies' shoes (1.5%). Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's, and children's shoes, and Kinney sells such quantities of virtually every type of men's, women's, and children's shoes. Thus, whether considered separately or together, the picture of this

merger is the same. We, therefore, agree with the District Court's conclusion that in the setting of this case to subdivide the shoe market further on the basis of "age/sex" distinctions would be "impractical" and "unwarranted."

The Geographic Market.

We agree with the parties and the District Court that insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation. The relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis, as Brown and Kinney, in fact, do. The anticompetitive effects of the merger are to be measured within this range of distribution.

The Probable Effect of the Merger.

Once the area of effective competition affected by a vertical arrangement has been defined, an analysis must be made to determine if the effect of the arrangement "may be substantially to lessen competition, or to tend to create a monopoly" in this market.

Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement "may be substantially to lessen competition, or to tend to create a monopoly" is the size of the share of the market foreclosed. However, this factor will seldom be determinative. If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act.[45] And the legislative history of § 7 indicates clearly that the

[45] 15 U. S. C. §§ 1 and 2. See S. Rep. No. 1775, 81st Cong., 2d Sess. 4–5.

tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act.[46] On the other hand, foreclosure of a *de minimis* share of the market will not tend "substantially to lessen competition."

Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor *de minimis* proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe.[47]

A most important such factor to examine is the very nature and purpose of the arrangement.[48] Congress not only indicated that "the tests of illegality [under § 7] are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act,"[49] but also chose for § 7 language virtually identical to that of § 3 of the Clayton Act, 15 U. S. C. § 14, which had been interpreted by this Court to require an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement. Thus, for example, if a particular vertical arrangement, considered under § 3, appears to be a limited term exclusive-dealing contract,

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[46] See note 33, *supra*.

[47] See note 38, *supra*, and note 55, *infra*, and the accompanying text.

[48] Although it is "unnecessary for the Government to speculate as to what is in the 'back of the minds' of those who promote a merger," H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8, evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger. *Swift & Co.* v. *United States*, 196 U. S. 375, 396; *United States* v. *Maryland & Virginia Milk Producers Assn.*, 167 F. Supp. 799, 804 (D. C. D. C.), aff'd, 362 U. S. 458.

[49] See H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8.

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the market foreclosure must generally be significantly greater than if the arrangement is a tying contract before the arrangement will be held to have violated the Act. Compare *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, and *Standard Oil Co. of California* v. *United States, supra,* with *International Salt Co.* v. *United States,* 332 U. S. 392.[50] The reason for this is readily discernible. The usual tying contract forces the customer to take a product or brand he does not necessarily want in order to secure one which he does desire. Because such an arrangement is inherently anticompetitive, we have held that its use by an established company is likely "substantially to lessen competition" although only a relatively small amount of commerce is affected. *International Salt Co.* v. *United States, supra.* Thus, unless the tying device is employed by a small company in an attempt to break into a market, cf. *Harley-Davidson Motor Co.*, 50 F. T. C. 1047, 1066, the use of a tying device can rarely [51] be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition. See *Standard Oil Co. of California* v. *United States, supra,* at 305–306. On the other hand, requirement contracts are frequently negotiated at the behest of the customer who has chosen the particular supplier and his product upon the basis of competitive merit. See, *e. g., Tampa Electric Co.* v. *Nashville Coal Co., supra.* Of course, the fact that requirement contracts are not inherently anticompetitive will not save a particular agreement if, in fact, it is likely "substantially to lessen competition, or to tend to create a monopoly." *E. g., Standard Oil Co. of California* v. *United States, supra.* Yet a requirement contract may escape censure if only a

[50] See also Comment, 59 Mich. L. Rev. 1236, 1239–1240 (1961).

[51] Compare *Standard Oil Co. of California* v. *United States,* 337 U. S. 293, 306, with *Federal Trade Comm'n* v. *Sinclair Refining Co.,* 261 U. S. 463.

small share of the market is involved, if the purpose of the agreement is to insure to the customer a sufficient supply of a commodity vital to the customer's trade or to insure to the supplier a market for his output and if there is no trend toward concentration in the industry. *Tampa Electric Co.* v. *Nashville Coal Co., supra.* Similar considerations are pertinent to a judgment under § 7 of the Act.

The importance which Congress attached to economic purpose is further demonstrated by the Senate and House Reports on H. R. 2734, which evince an intention to preserve the "failing company" doctrine of *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291.[52] Similarly, Congress foresaw that the merger of two large companies or a large and a small company might violate the Clayton Act while the merger of two small companies might not, although the share of the market foreclosed be identical, if the purpose of the small companies is to enable them in combination to compete with larger corporations dominating the market.[53]

The present merger involved neither small companies nor failing companies. In 1955, the date of this merger, Brown was the fourth largest manufacturer in the shoe industry with sales of approximately 25 million pairs of shoes and assets of over $72,000,000 while Kinney had sales of about 8 million pairs of shoes and assets of about $18,000,000. Not only was Brown one of the leading manufacturers of men's, women's, and children's shoes, but Kinney, with over 350 retail outlets, owned and operated the largest independent chain of family shoe stores in the Nation. Thus, in this industry, no merger between

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[52] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 6; S. Rep. No. 1775, 81st Cong., 2d Sess. 7.

[53] See note 34, *supra.* Compare *Harley-Davidson Co.,* 50 F. T. C. 1047, 1066, and U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 143 (1955).

a manufacturer and an independent retailer could involve a larger potential market foreclosure. Moreover, it is apparent both from past behavior of Brown and from the testimony of Brown's President,[54] that Brown would use its ownership of Kinney to force Brown shoes into Kinney stores. Thus, in operation this vertical arrangement would be quite analogous to one involving a tying clause.[55]

Another important factor to consider is the trend toward concentration in the industry.[56] It is true, of course, that the statute prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition.[57] But the very wording of § 7 requires a prognosis of the probable *future* effect of the merger.[58]

The existence of a trend toward vertical integration, which the District Court found, is well substantiated by the record. Moreover, the court found a tendency of the acquiring manufacturers to become increasingly important sources of supply for their acquired outlets. The necessary corollary of these trends is the foreclosure of independent manufacturers from markets otherwise open to them. And because these trends are not the product of accident but are rather the result of deliberate policies of Brown and other leading shoe manufacturers, account must be taken of these facts in order to predict the prob-

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[54] See note 8, *supra*.

[55] Moreover, ownership integration is a more permanent and irreversible tie than is contract integration. See Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 78 (1959).

[56] See generally *Pillsbury Mills, Inc.*, 50 F. T. C. 555, 572–573; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 606 (D. C. S. D. N. Y.); Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa. L. Rev. 176, 180 (1955); U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 124 (1955).

[57] See Handler and Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Col. L. Rev. 629, 668 (1961).

[58] See note 39, *supra*, and accompanying text.

able future consequences of this merger. It is against this background of continuing concentration that the present merger must be viewed.

Brown argues, however, that the shoe industry is at present composed of a large number of manufacturers and retailers, and that the industry is dynamically competitive. But remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly. See *Pillsbury Mills, Inc.*, 50 F. T. C. 555, 573. It is the probable effect of the merger upon the future as well as the present which the Clayton Act commands the courts and the Commission to examine.[59]

Moreover, as we have remarked above, not only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress.[60] Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure. The Senate Report, quoting with approval from the Federal Trade Commission's 1948 report on the merger movement, states explicitly that amended § 7 is addressed, *inter alia,* to the following problem:

> "Under the Sherman Act, an acquisition is unlawful if it creates a monopoly or constitutes an attempt to monopolize. Imminent monopoly may appear when one large concern acquires another, but it is unlikely to be perceived in a small acquisition by a large enterprise. As a large concern grows through a series of such small acquisitions, its accretions of

[59] *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 589, 597.

[60] See note 28, *supra,* and accompanying text.

power are individually so minute as to make it difficult to use the Sherman Act test against them. . . .

"Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply." S. Rep. No. 1775, 81st Cong., 2d Sess. 5.[61] And see H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8.

The District Court's findings, and the record facts, many of them set forth in Part I of this opinion, convince us that the shoe industry is being subjected to just such a cumulative series of vertical mergers which, if left unchecked, will be likely "substantially to lessen competition."

We reach this conclusion because the trend toward vertical integration in the shoe industry, when combined with Brown's avowed policy of forcing its own shoes upon its retail subsidiaries, may foreclose competition from a substantial share of the markets for men's, women's, and children's shoes, without producing any countervailing competitive, economic, or social advantages.

V.

The Horizontal Aspects of the Merger.

An economic arrangement between companies performing similar functions in the production or sale of comparable goods or services is characterized as "horizontal." The effect on competition of such an arrangement depends, of course, upon its character and scope. Thus, its validity in the face of the antitrust laws will depend upon such factors as: the relative size and number of the

[61] See also Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa. L. Rev. 176, 180 (1955).

parties to the arrangement; whether it allocates shares of the market among the parties; whether it fixes prices at which the parties will sell their product; or whether it absorbs or insulates competitors.[62] Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies.[63] The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an economically significant market.

Thus, again, the proper definition of the market is a "necessary predicate" to an examination of the competition that may be affected by the horizontal aspects of the merger. The acquisition of Kinney by Brown resulted in a horizontal combination at both the manufacturing and retailing levels of their businesses. Although the District Court found that the merger of Brown's and Kinney's *manufacturing* facilities was economically too insignificant to come within the prohibitions of the Clayton Act, the Government has not appealed from this portion of the lower court's decision. Therefore, we have no occasion to express our views with respect to that finding. On the other hand, appellant does contest the District Court's finding that the merger of the companies' *retail* outlets may tend substantially to lessen competition.

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[62] See, *e. g.*, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *Sugar Institute, Inc.*, v. *United States*, 297 U. S. 553; *United States* v. *Paramount Pictures*, 334 U. S. 131; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593.

[63] See note 30, *supra*.

The Product Market.

Shoes are sold in the United States in retail shoe stores and in shoe departments of general stores. These outlets sell: (1) men's shoes, (2) women's shoes, (3) women's or children's shoes, or (4) men's, women's or children's shoes. Prior to the merger, both Brown and Kinney sold their shoes in competition with one another through the enumerated kinds of outlets characteristic of the industry.

In Part IV of this opinion we hold that the District Court correctly defined men's, women's, and children's shoes as the relevant lines of commerce in which to analyze the vertical aspects of the merger. For the reasons there stated we also hold that the same lines of commerce are appropriate for considering the horizontal aspects of the merger.

The Geographic Market.

The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market. See S. Rep. No. 1775, 81st Cong., 2d Sess. 5–6; *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593. Moreover, just as a product submarket may have § 7 significance as the proper "line of commerce," so may a geographic submarket be considered the appropriate "section of the country." *Erie Sand & Gravel Co.* v. *Federal Trade Comm'n*, 291 F. 2d 279, 283 (C. A. 3d Cir.); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 595–603 (D. C. S. D. N. Y.). Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one. The geographic market selected must, therefore, both "correspond to the commercial realities" [64] of the industry and be economi-

[64] *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (D. C. S. D. N. Y.), aff'd, 259 F. 2d 524 (C. A. 2d Cir.); S. Rep. No. 1775, 81st Cong., 2d Sess. 5–6.

cally significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area. *United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 193–194 (D. C. S. D. N. Y.); *United States* v. *Maryland & Virginia Milk Producers Assn.*, 167 F. Supp. 799 (D. C. D. C.), affirmed, 362 U. S. 458. The fact that two merging firms have competed directly on the horizontal level in but a fraction of the geographic markets in which either has operated, does not, in itself, place their merger outside the scope of § 7. That section speaks of "any . . . section of the country," and if anticompetitive effects of a merger are probable in "any" significant market, the merger—at least to that extent—is proscribed.[65]

The parties do not dispute the findings of the District Court that the Nation as a whole is the relevant geographic market for measuring the anticompetitive effects of the merger viewed vertically or of the horizontal merger of Brown's and Kinney's manufacturing facilities. As to the retail level, however, they disagree.

The District Court found that the effects of this aspect of the merger must be analyzed in every city with a population exceeding 10,000 and its immediate contiguous surrounding territory in which both Brown and Kinney sold shoes at retail through stores they either owned or controlled.[66] By this definition of the geographic mar-

[65] To illustrate: If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected. On the other hand, that fact would, of course, be properly considered in determining the equitable relief to be decreed. Cf. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (D. C. E. D. Pa.), aff'd, 365 U. S. 567.

[66] In describing the geographic market in which Brown and Kinney competed, the District Court included cities in which Brown "Fran-

ket, less than one-half of all the cities in which either Brown or Kinney sold shoes through such outlets are represented. The appellant recognizes that if the District Court's characterization of the relevant market is proper, the number of markets in which both Brown and Kinney have outlets is sufficiently numerous so that the validity of the entire merger is properly judged by testing its effects in those markets. However, it is appellant's contention that the areas of effective competition in shoe retailing were improperly defined by the District Court. It claims that such areas should, in some cases, be defined so as to include only the central business districts of large cities, and in others, so as to encompass the "standard metropolitan areas" within which smaller communities are found. It argues that any test failing to distinguish between these competitive situations is improper.

We believe, however, that the record fully supports the District Court's findings that shoe stores in the outskirts of cities compete effectively with stores in central

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chise Plan" and "Wohl Plan" stores were located. Although such stores were not owned or directly controlled by Brown, did not sell Brown products exclusively and did not finance inventory through Brown, we believe there was adequate evidence before the District Court to support its finding that such stores were "Brown stores." To such stores Brown provided substantial assistance in the form of merchandising and advertising aids, reports on market and management research, loans, group life and fire insurance and centralized purchase of rubber footwear from manufacturers on Brown's credit. For these services, Brown required the retailer to deal almost exclusively in Brown's products in the price scale at which Brown shoes sold. Further, Brown reserved the power to terminate such franchise agreements on 30 days' notice. Since the retailer was required, under this plan, to invest his own resources and develop his good will to a substantial extent in the sale of Brown products, the flow of which Brown could readily terminate, Brown was able to exercise sufficient control over these stores and departments to warrant their characterization as "Brown" outlets for the purpose of measuring the share and effect of Brown's competition at the retail level. Cf. *Standard Oil Co. of California* v. *United States,* 337 U. S. 293.

downtown areas, and that while there is undoubtedly some commercial intercourse between smaller communities within a single "standard metropolitan area," the most intense and important competition in retail sales will be confined to stores within the particular communities in such an area and their immediate environs.[67]

We therefore agree that the District Court properly defined the relevant geographic markets in which to analyze this merger as those cities with a population exceeding 10,000 and their environs in which both Brown and Kinney retailed shoes through their own outlets. Such markets are large enough to include the downtown shops and suburban shopping centers in areas contiguous to the city, which are the important competitive factors, and yet are small enough to exclude stores beyond the immediate environs of the city, which are of little competitive significance.

The Probable Effect of the Merger.

Having delineated the product and geographic markets within which the effects of this merger are to be measured, we turn to an examination of the District Court's finding that as a result of the merger competition in the retailing of men's, women's and children's shoes may be lessened substantially in those cities in which both Brown and Kinney stores are located. We note, initially, that appellant challenges this finding on a number of grounds other than those discussed above and on grounds independent of the critical question of whether competition may, in fact, be lessened. Thus, Brown objects that the District Court did not examine the competitive picture in each line of commerce and each section of the country it had defined as appropriate. It says the Court erred in failing to enter findings with respect to each relevant city assessing

[67] The District Court limited its findings to cities having a population of at least 10,000 persons, since Kinney operated only in such areas.

the anticompetitive effect of the merger on the retail sale of, for example, men's shoes in Council Bluffs, men's shoes in Texas City, women's shoes in Texas City and children's shoes in St. Paul. Even assuming a representative sample could properly be used, Brown also objects that the District Court's detailed analysis of competition in shoe retailing was limited to a single city—St. Louis—a city in which Kinney did not operate. The appellant says this analysis could not be sufficiently representative to establish a standard image of the shoe trade which could be applied to each of the more than 100 cities in which Brown and Kinney sold shoes, particularly as some of those cities were much smaller than St. Louis, others were larger, some were in different climates and others were in areas having different median per capita incomes.

However, we believe the record is adequate to support the findings of the District Court. While it is true that the court concentrated its attention on the structure of competition in the city in which it sat and as to which detailed evidence was most readily available, it also heard witnesses from no less than 40 other cities in which the parties to the merger operated. The court was careful to point out that it was on the basis of all the evidence that it reached its conclusions concerning the boundaries of the relevant markets and the merger's effects on competition within them. We recognize that variations of size, climate and wealth as enumerated by Brown exist in the relevant markets. However, we agree with the court below that the markets with respect to which evidence was received provide a fair sampling of all the areas in which the impact of this merger is to be measured. The appellant has not shown how the variables it has mentioned could affect the structure of competition within any particular market so as to require a change in the conclusions drawn by the District Court. Each competitor within a given market is equally affected by these factors, even though the city in which he does busi-

ness may differ from St. Louis in size, climate or wealth. Thus, we believe the District Court properly reached its conclusions on the basis of the evidence available to it. There is no reason to protract already complex antitrust litigation by detailed analyses of peripheral economic facts, if the basic issues of the case may be determined through study of a fair sample.[68]

In the case before us, not only was a fair sample used to demonstrate the soundness of the District Court's conclusions, but evidence of record fully substantiates those findings as to each relevant market. An analysis of undisputed statistics of sales of shoes in the cities in which both Brown and Kinney sell shoes at retail, separated into the appropriate lines of commerce, provides a persuasive factual foundation upon which the required prognosis of the merger's effects may be built. Although Brown objects to some details in the Government's computations used in drafting these exhibits, appellant cannot deny the correctness of the more general picture they reveal.[69] We have appended the exhibits to this opinion.

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[68] See *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 313; U. S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 126 (1955): "While sufficient data to support a conclusion is required, sufficient data to give the enforcement agencies, the courts and business certainty as to competitive consequences would nullify the words 'Where the effect may be' in the Clayton Act and convert them into 'Where the effect is.'" And the Committee of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases has also emphasized the need for limiting the mass of possibly relevant evidence in cases of this type in order to avoid confusion and its concomitant increased possibility of error. 13 F. R. D. 62, 64.

[69] Brown objects, for example, to the fact that these exhibits are drafted on the basis of the *cities* concerning which census information was available, rather than on the basis of the *cities and their environs*—as the relevant markets were defined by the District Court. However, the record shows that the statistics of shoe sales in cities by and large conform to statistics of shoe sales in counties in which those cities are the principal metropolitan area. See Appendix D,

They show, for example, that during 1955 in 32 separate cities, ranging in size and location from Topeka, Kansas, to Batavia, New York, and Hobbs, New Mexico, the com-

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infra. Thus, we find no error in a conclusion drawn as to a slightly larger market from the available record of sales in cities alone. Brown also objects to the use of pairage sales, rather than dollar volume, as the basis for defining the size, and measuring Brown's shares, of the market. However, since Brown and Kinney sold shoes primarily in the low and medium price ranges, and in the light of the conceded spread in shoe prices, we agree that sales measured by pairage provide a more accurate picture of the Brown-Kinney shares of the market than do sales measured in dollars. Detailed statistics of shoe sales were available only in terms of dollar volume, however, and Brown objects to the method by which the Government has converted those figures into those reflecting sales in terms of pairage. The Government's conversion was, with some exceptions, based on national median income and national averages of shoe prices and the ratio of men, women and children in the population. The District Court accepted expert testimony offered by the Government to the effect that shoe price and population age, sex and income variations in the relevant cities produced, at most, a 6% error in the converted statistics, and that this error was as likely to favor Brown (by increasing the universe of sales against which Brown's shares were to be measured) as it was to disfavor it. We find no error in the District Court's acceptance of the Government's evidence as to the propriety of the accounting methods its experts employed. Lastly, Brown objects that the statistics concerning its own pairage sales were improperly derived since they included sales by its wholesale distributors to the retail outlets on its franchise plans in the same category as sales to ultimate consumers by its owned retail stores. Again, while recognizing a possible margin of error in statistics combining sales at two levels of distribution, we believe they provide an adequate basis upon which to gauge Brown sales through outlets it controlled. Particularly as the franchise stores were required to finance their own inventory, does it seem reasonable to conclude that most of their purchases from Brown's distributors were eventually resold. In summary, although appellant may point to technical flaws in the compilation of these statistics, we recognize that in cases of this type precision in detail is less important than the accuracy of the broad picture presented. We believe the picture as presented by the Government in this case is adequate for making the determination required by § 7: whether this merger *may* tend to lessen competition substantially in the relevant markets.

bined share of Brown and Kinney sales of women's shoes (by unit volume) exceeded 20%.[70] In 31 cities—some the same as those used in measuring the effect of the merger in the women's line—the combined share of children's shoes sales exceeded 20%; in 6 cities their share exceeded 40%. In Dodge City, Kansas, their combined share of the market for women's shoes was over 57%; their share of the children's shoe market in that city was 49%. In the 7 cities in which Brown's and Kinney's combined shares of the market for women's shoes were greatest (ranging from 33% to 57%) each of the parties alone, prior to the merger, had captured substantial portions of those markets (ranging from 13% to 34%); the merger intensified this existing concentration. In 118 separate cities the combined shares of the market of Brown and Kinney in the sale of one of the relevant lines of commerce exceeded 5%. In 47 cities, their share exceeded 5% in all three lines.

The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market.[71] In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving

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[70] Although the sum of the parties' pre-existing shares of the market will normally equal their combined share of the immediate post-merger market, we recognize that this share need not remain stable in the future. Nevertheless, such statistics provide a graphic picture of the immediate impact of a merger, and, as such, also provide a meaningful base upon which to build conclusions of the probable future effects of the merger.

[71] See *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 595–596; *A. G. Spaulding & Bros.* v. *Federal Trade Comm'n*, 301 F. 2d 585, 612–615 (C. A. 3d Cir.); *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 603–611 (D. C. S. D. N. Y.). Cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 279, 308–311 (1960).

5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. Furthermore, in this fragmented industry, even if the combination controls but a small share of a particular market, the fact that this share is held by a large national chain can adversely affect competition. Testimony in the record from numerous independent retailers, based on their actual experience in the market, demonstrates that a strong, national chain of stores can insulate selected outlets from the vagaries of competition in particular locations and that the large chains can set and alter styles in footwear to an extent that renders the independents unable to maintain competitive inventories. A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.

Other factors to be considered in evaluating the probable effects of a merger in the relevant market lend addi-

tional support to the District Court's conclusion that this merger may substantially lessen competition. One such factor is the history of tendency toward concentration in the industry.[72] As we have previously pointed out, the shoe industry has, in recent years, been a prime example of such a trend. Most combinations have been between manufacturers and retailers, as each of the larger producers has sought to capture an increasing number of assured outlets for its wares. Although these mergers have been primarily vertical in their aim and effect, to the extent that they have brought ever greater numbers of retail outlets within fewer and fewer hands, they have had an additional important impact on the horizontal plane. By the merger in this case, the largest single group of retail stores still independent of one of the large manufacturers was absorbed into an already substantial aggregation of more or less controlled retail outlets. As a result of this merger, Brown moved into second place nationally in terms of retail stores directly owned. Including the stores on its franchise plan, the merger placed under Brown's control almost 1,600 shoe outlets, or about 7.2% of the Nation's retail "shoe stores" as defined by the Census Bureau,[73] and 2.3% of the Nation's total retail

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[72] See note 38, *supra*. A company's history of expansion through mergers presents a different economic picture than a history of expansion through unilateral growth. Internal expansion is more likely to be the result of increased demand for the company's products and is more likely to provide increased investment in plants, more jobs and greater output. Conversely, expansion through merger is more likely to reduce available consumer choice while providing no increase in industry capacity, jobs or output. It was for these reasons, among others, Congress expressed its disapproval of successive acquisitions. Section 7 was enacted to prevent even small mergers that added to concentration in an industry. See S. Rep. No. 1775, 81st Cong., 2d Sess. 5. Cf. *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 566 (D. C. E. D. Pa.) aff'd, 365 U. S. 567; *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 606 (D. C. S. D. N. Y.).

[73] See note 5, *supra*.

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shoe outlets.[74] We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time. In the light of the trends in this industry we agree with the Government and the court below that this is an appropriate place at which to call a halt.

At the same time appellant has presented no mitigating factors, such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position, nor a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets. On the basis of the record before us, we believe the Government sustained its burden of proof. We hold that the District Court was correct in concluding that this merger may tend to lessen competition substantially in the retail sale of men's, women's, and children's shoes in the overwhelming majority of those cities and their environs in which both Brown and Kinney sell through owned or controlled outlets.

The judgment is

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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[74] Although statistics concerning the degree of concentration and the rank of Brown-Kinney in terms of controlled retail stores in each of the relevant product and geographic markets would have been more helpful in analyzing the results of this merger, neither side has presented such statistics. The figures in the record, based on national rank, are, nevertheless, useful in depicting the trends in the industry.

APPENDIX A

Sales of women's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)*	Combined Brown-Kinney share (%)*
Dodge City, Kans	31,400	23.3	34.4	57.7
Texas City, Tex	32,300	27.8	20.7	48.5
Council Bluffs, Iowa	68,200	27.3	15.4	42.7
Marshalltown, Iowa	72,600	21.8	13.4	35.2
Uniontown, Pa	144,900	16.3	18.8	35.1
Ardmore, Okla	62,600	14.4	20.3	34.7
Keokuk, Iowa	34,600	18.4	14.8	33.2
Ottumwa, Iowa	67,200	28.2	4.3	32.5
Pine Bluff, Ark	63,100	21.6	9.4	31.0
Lawton, Okla	95,200	20.2	9.8	30.0
Borger, Tex	50,100	15.5	13.8	29.3
Roswell, N. Mexico	80,900	11.7	15.8	27.5
Topeka, Kans	224,000	11.7	15.8	27.5
Coatesville, Pa	46,200	17.2	10.0	27.2
Hobbs, N. Mexico	50,800	22.2	5.0	27.2
Iowa City, Iowa	72,200	15.3	10.7	26.0
Dubuque, Iowa	119,000	14.3	11.5	25.8
Carlisle, Pa	55,500	17.5	5.9	23.4
Texarkana, Ark	65,800	15.9	7.5	23.4
Fort Dodge, Iowa	104,000	10.8	12.5	23.3
Steubenville, Ohio	207,200	14.9	8.1	23.0
Mason City, Iowa	102,400	14.4	8.3	22.7
Marion, Ohio	91,600	6.7	15.7	22.4
Pueblo, Colo	152,400	14.1	7.5	21.6
Hibbing, Minn	44,600	18.1	3.4	21.5
Fargo, N. Dak	162,800	15.3	6.2	21.5
Franklin, Pa	32,100	14.4	7.1	21.5
Corpus Christi, Tex	331,500	2.4	19.0	21.4
Batavia, N.Y	75,300	13.2	8.1	21.3
McAllen, Tex	90,200	13.0	8.3	21.3
Concord, N.H	57,300	15.6	4.7	20.3
Sioux City, Iowa	222,000	7.7	12.3	20.0
Muskogee, Okla	68,100	7.6	12.2	19.8
Rochester, Minn	130,100	11.2	8.6	19.8
Bartlesville, Okla	63,100	15.8	3.9	19.7
Berwyn, Ill	95,900	17.8	1.9	19.7
Clarksburg, W. Va	134,600	15.5	3.9	19.4
Davenport, Iowa	230,300	6.4	12.8	19.2
Freeport, Ill	88,000	10.7	8.3	19.0
Grand Forks, N. Dak	121,100	12.8	6.1	18.9
Muskegon, Mich	172,000	4.0	14.9	18.9
Baton Rouge, La	398,100	3.8	14.9	18.7
Des Moines, Iowa	562,800	4.9	13.8	18.7

* The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets.

Women's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%) *	Combined Brown-Kinney share (%) *
Springfield, Mo.	210,400	3.7	14.9	18.6
Laredo, Tex.	166,200	15.3	3.2	18.5
St. Cloud, Minn.	88,400	9.6	8.9	18.5
Fort Smith, Ark.	165,200	11.8	6.5	18.3
Kingsport, Tenn.	106,200	13.0	5.1	18.1
Gulfport, Miss.	99,700	14.2	3.7	17.9
Cortland, N.Y.	55,300	12.2	5.5	17.7
Fremont, Nebr.	56,100	11.8	5.6	17.4
Manitowoc, Wis.	60,800	13.9	3.5	17.4
Salina, Kans.	102,800	13.8	3.3	17.1
Muncie, Ind.	158,000	7.9	9.0	16.9
Portsmouth, Ohio	141,200	9.2	7.2	16.4
Reading, Pa.	417,200	6.0	10.4	16.4
Greensburg, Pa.	117,800	8.0	7.9	15.9
Little Rock, Ark.	468,100	2.7	13.2	15.9
Flint, Mich.	628,300	2.7	13.1	15.8
Wichita, Kans.	666,600	7.5	8.3	15.8
Lubbock, Tex.	305,500	3.9	11.7	15.6
Kingston, N.Y.	112,100	11.6	3.9	15.5
Emporia, Kans.	44,300	14.3	0.8	15.1
Johnson City, Tenn.	75,800	12.0	3.1	15.1
Odessa, Tex.	167,700	8.1	7.0	15.1
Bloomington, Ill.	129,600	6.2	8.6	14.8
Elgin, Ill.	126,900	6.7	8.0	14.7
Enid, Okla.	140,400	10.7	4.0	14.7
Burlington, Iowa	74,500	10.7	3.9	14.6
South Bend, Ind.	434,500	1.6	13.0	14.6
Galesburg, Ill.	95,600	12.4	2.1	14.5
Abilene, Tex.	184,300	12.4	2.0	14.4
Meridian, Miss.	120,000	3.7	10.6	14.3
Toledo, Ohio	821,800	1.3	12.6	13.9
Tulsa, Okla.	749,000	7.0	6.9	13.9
Colorado Springs, Colo.	225,600	7.5	6.1	13.6
Williamsport, Pa.	153,400	4.1	9.2	13.3
Mankato, Minn.	99,900	7.9	5.3	13.2
Green Bay, Wis.	220,000	7.5	5.2	12.7
Waterloo, Iowa	224,100	10.2	2.3	12.5
Sioux Falls, S. Dak.	172,000	7.4	4.9	12.3
Glens Falls, N.Y.	115,300	7.6	4.6	12.2
Kansas City, Kans.	181,300	8.6	3.6	12.2
Oklahoma City, Okla.	839,500	1.8	10.4	12.2
Hutchinson, Kans.	156,400	9.0	2.4	11.4
Kenosha, Wis.	107,700	7.0	4.3	11.3
Pottsville, Pa.	147,000	6.0	5.3	11.3
San Angelo, Tex.	113,800	6.5	4.6	11.1
Wheeling, W. Va.	311,600	6.9	3.9	10.8
Ithaca, N.Y.	82,300	5.8	4.7	10.5
Zanesville, Ohio	138,800	9.0	1.5	10.5
Mobile, Ala.	473,100	1.0	9.4	10.4

* See footnote on p. 347.

Women's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%) *	Combined Brown-Kinney share (%) *
York, Pa	344,200	5.1	4.9	10.0
Gary, Ind	414,400	4.3	5.3	9.6
Decatur, Ill	221,800	3.9	5.5	9.4
Amarillo, Tex	334,100	5.6	3.2	8.8
Minneapolis, Minn	1,909,900	5.3	3.1	8.4
Fort Worth, Tex	1,092,100	1.4	6.9	8.3
Waco, Tex	170,400	5.4	2.9	8.3
Altoona, Pa	241,000	4.8	3.3	8.1
Lancaster, Pa	316,400	3.9	4.2	8.1
Rockford, Ill	377,400	5.0	3.1	8.1
Saginaw, Mich	326,300	2.1	5.6	7.7
Grand Rapids, Mich	650,300	5.8	1.6	7.4
Jacksonville, Fla	739,200	0.6	6.7	7.3
Columbus, Ga	308,300	3.4	3.5	6.9
Evansville, Ind	486,600	3.1	3.6	6.7
St. Paul, Minn	1,013,200	3.1	3.5	6.6
Montgomery, Ala	437,100	1.7	4.7	6.4
Peoria, Ill	469,300	3.6	2.8	6.4
Springfield, Ill	304,400	5.1	1.3	6.4
Milwaukee, Wis	1,984,900	5.9	0.3	6.2
San Antonio, Tex	1,476,000	1.0	4.7	5.7
Cedar Rapids, Iowa	256,600	3.9	1.2	5.1

* See footnote on p. 347.

Source: GX 9, 214, R. 60–70, 1223–1227; DX RR, DDDD–1, DDDD–2, R. 3892–4315, 4939–5299, 5300–5652.

APPENDIX B

Sales of children's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)*	Combined Brown-Kinney share (%)*
Coatesville, Pa.	20,900	20.8	31.0	51.8
Dodge City, Kans.	14,200	35.5	13.5	49.0
Council Bluffs, Iowa	30,900	36.6	6.5	43.1
Ardmore, Okla.	28,400	20.7	21.0	41.7
Pueblo, Colo.	69,100	25.4	15.8	41.2
Borger, Tex.	22,700	24.8	16.1	40.9
Berwyn, Ill.	43,500	31.2	3.4	34.6
Batavia, N.Y.	34,100	14.0	19.3	33.3
Ottumwa, Iowa	30,500	30.4	2.5	32.9
Carlisle, Pa.	25,200	21.4	11.3	32.7
Manitowoc, Wis.	27,600	19.2	12.1	31.3
Lawton, Okla.	43,200	18.3	12.6	30.9
Franklin, Pa.	14,500	14.4	14.9	29.3
Gulfport, Miss.	45,200	24.5	4.5	29.0
Fremont, Nebr.	25,400	14.3	14.6	28.9
Bartlesville, Okla.	28,600	20.7	7.8	28.5
Concord, N.H.	26,000	16.3	11.8	28.1
Uniontown, Pa.	65,700	18.9	8.3	27.2
Marshalltown, Iowa	32,900	22.8	4.2	27.0
Cortland, N.Y.	25,100	13.8	12.4	26.2
Kingsport, Tenn.	48,100	14.8	10.6	25.4
McAllen, Tex.	40,000	17.0	7.5	24.5
Topeka, Kans.	101,600	15.7	7.2	22.9
Texarkana, Ark.	29,800	19.2	3.6	22.8
Johnson City, Tenn.	34,300	13.0	9.4	22.4
Dubuque, Iowa	53,900	17.6	4.5	22.1
Emporia, Kans.	20,100	14.5	7.4	21.9
Iowa City, Iowa	32,700	15.8	5.8	21.6
Muskogee, Okla.	30,900	10.7	10.9	21.6
Salina, Kans.	46,600	12.5	8.7	21.2
Mason City, Iowa	46,400	16.8	3.4	20.2
Enid, Okla.	63,700	12.1	6.9	19.0
Kingston, N.Y.	50,800	12.8	5.1	17.9
Rochester, Minn.	59,100	7.5	9.9	17.4
Ithaca, N.Y.	37,300	5.5	11.8	17.3
Hutchinson, Kans.	70,900	10.9	6.0	16.9
Baton Rouge, La.	180,400	8.0	8.6	16.6
Grand Forks, N. Dak.	54,900	12.7	3.4	16.1
Sioux City, Iowa	100,600	9.8	5.9	15.7
Altoona, Pa.	109,300	12.5	2.9	15.4
Elgin, Ill.	57,500	13.1	2.3	15.4

*The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets, with the single exception of Manitowoc, Wis., in which case they reflect the sale of Brown brand shoes through all outlets, regardless of ownership or control, and are, therefore, marginally too high.

Children's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%) *	Combined Brown-Kinney share (%) *
Meridian, Miss.	54,400	6.7	8.7	15.4
Wichita, Kans.	302,200	9.6	5.6	15.2
Colorado Springs, Colo.	102,300	8.0	7.1	15.1
Fort Smith, Ark.	74,900	12.1	3.0	15.1
Fort Dodge, Iowa	47,100	12.5	2.4	14.9
Zanesville, Ohio	62,900	9.7	4.8	14.5
Muskegon, Mich.	78,000	7.4	6.6	14.0
Steubenville, Ohio	93,900	11.4	2.4	13.8
Tulsa, Okla.	339,500	8.6	5.2	13.8
Corpus Christi, Tex.	150,300	4.4	8.8	13.2
Davenport, Iowa	104,400	8.4	4.8	13.2
Fargo, N. Dak.	73,800	9.0	3.8	12.8
Wheeling, W. Va.	141,200	8.7	4.1	12.8
Amarillo, Tex.	151,400	8.5	4.2	12.7
Little Rock, Ark.	212,200	3.0	9.5	12.5
South Bend, Ind.	197,000	2.9	9.4	12.3
Greensburg, Pa.	53,400	8.9	3.0	11.9
Des Moines, Iowa	225,100	6.5	5.1	11.6
Glens Falls, N.Y.	52,300	10.2	1.2	11.4
Green Bay, Wis.	99,700	7.3	3.8	11.1
Decatur, Ill.	100,500	6.3	4.4	10.7
Fort Worth, Tex.	495,100	3.3	7.4	10.7
Mobile, Ala.	198,100	4.5	6.2	10.7
Gary, Ind.	187,800	7.0	3.6	10.6
Bloomington, Ill.	58,800	6.5	4.0	10.5
Springfield, Mo.	95,400	3.1	6.5	9.6
Williamsport, Pa.	69,600	5.0	4.5	9.5
Waco, Tex.	77,200	6.3	3.2	9.5
Lubbock, Tex.	138,500	6.4	2.8	9.2
Pottsville, Pa.	66,600	5.9	3.3	9.2
Milwaukee, Wis.	899,800	8.3	0.4	8.7
Lancaster, Pa.	143,400	6.2	2.3	8.5
Tampa, Fla.	251,600	4.5	4.0	8.5
Oklahoma City, Okla.	380,600	2.5	5.8	8.3
Mankato, Minn.	45,300	8.9	1.1	7.9
Minneapolis, Minn.	865,800	6.7	1.2	7.9
Peoria, Ill.	212,700	6.7	1.0	7.7
Columbus, Ga.	139,700	6.4	1.2	7.6
Reading, Pa.	189,100	4.4	3.1	7.5
Toledo, Ohio	372,500	1.5	5.3	6.8
Jacksonville, Fla.	335,100	2.0	4.5	6.5
Springfield, Ill.	558,500	5.7	0.7	6.4
Montgomery, Ala.	164,500	3.3	2.9	6.2
Brownsville, Tex.	100,500	4.3	1.8	6.1
Saginaw, Mich.	147,900	3.5	2.5	6.0
St. Paul, Minn.	459,300	2.7	2.5	5.2
Detroit, Mich.	2,483,900	4.4	0.6	5.0

* See footnote on p. 350.

Source: GX 9, 214, R. 60-70, 1228-1232; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX C

Sales of men's shoes by Brown and Kinney as a share of the total city sales in selected areas (1955)

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)*	Combined Brown-Kinney share (%)*
Dodge City, Kans.	12,000	16.4	8.4	24.8
Ardmore, Okla.	23,900	8.1	15.5	23.6
Batavia, N.Y.	28,700	8.9	11.3	20.2
Lawton, Okla.	36,300	11.3	8.2	19.5
Borger, Tex.	19,100	11.5	7.8	19.3
Pueblo, Colo.	58,100	8.6	10.3	18.9
Carlisle, Pa.	21,200	14.3	4.2	18.5
Fremont, Nebr.	21,400	8.0	10.4	18.4
Coatesville, Pa.	17,600	9.3	8.2	17.5
Manitowoc, Wis.	23,200	10.1	7.3	17.4
Franklin, Pa.	12,200	10.5	5.3	15.8
Council Bluffs, Iowa	26,000	14.0	1.1	15.1
Concord, N.H.	21,900	11.0	3.7	14.7
Texarkana, Ark.	25,100	12.1	2.6	14.7
Corpus Christi, Tex.	126,500	2.0	12.3	14.3
Muskogee, Okla.	26,000	6.5	7.6	14.1
Emporia, Kans.	16,900	7.8	5.7	13.5
Kingsport, Tenn.	40,500	7.2	5.9	13.1
Bartlesville, Okla.	24,100	8.9	4.1	13.0
Cortland, N.Y.	21,100	7.6	5.2	12.8
Dubuque, Iowa	45,400	10.2	2.1	12.3
McAllen, Tex.	34,400	8.4	3.5	11.9
Berwyn, Ill.	36,600	9.1	2.6	11.7
Salina, Kans.	39,200	7.2	3.9	11.1
Kingston, N.Y.	42,800	6.9	3.7	10.6
Elgin, Ill.	48,400	10.1	0.4	10.5
Enid, Okla.	53,600	5.9	4.6	10.5
Uniontown, Pa.	55,300	7.3	2.9	10.2
Rochester, Minn.	49,600	4.3	5.5	9.8
Fort Smith, Ark.	63,000	5.2	4.5	9.7
Topeka, Kans.	85,500	9.0	0.5	9.5
Hutchinson, Kans.	59,700	5.1	3.7	8.8
Johnson City, Tenn.	28,900	7.7	1.0	8.7
Davenport, Iowa	87,900	6.0	1.7	7.7
Ithaca, N.Y.	31,400	3.5	4.2	7.7
Zanesville, Ohio	53,000	5.2	2.1	7.3
Muskegon, Mich.	65,600	5.1	1.7	6.8
Steubenville, Ohio	79,000	5.7	1.1	6.8
Springfield, Mo.	80,300	3.6	2.8	6.4

*The percentages in these columns reflect sales of Brown brand shoes through Brown owned or controlled outlets, with the single exception of Concord, N.H., in which case they reflect the sale of Brown brand shoes through all outlets, regardless of ownership or control, and are, therefore, marginally too high.

Men's shoes—Continued

Area	Total sales (pairs)	Kinney Shoe Store (%)	Brown owned or controlled outlets (%)*	Combined Brown-Kinney share (%)*
Amarillo, Tex.	127,400	4.6	1.3	5.9
Asheville, N.C.	80,900	2.9	2.9	5.8
Green Bay, Wis.	83,900	4.0	1.6	5.6
Waco, Tex.	65,000	2.6	3.0	5.6
Greensburg, Pa.	44,900	4.4	1.0	5.4
Peoria, Ill.	179,000	4.7	0.7	5.4
Reading, Pa.	159,200	2.7	2.6	5.3
Wichita, Kans.	254,300	4.3	0.9	5.2
Colorado Springs, Colo.	86,100	4.4	0.7	5.1

* See footnote on p. 352.

Source: GX 9, 214, R. 60-70, 1219-1222; DX RR, DDDD-1, DDDD-2, R. 3892-4315, 4939-5299, 5300-5652.

APPENDIX D

Comparison of Brown-Kinney percentage of industry shoe sales for selected cities, and counties or standard metropolitan areas

[Appellant's percentages of 1954 dollar sales adjusted to include sales of Brown franchise and Wohl plan stores]

City	City percentage [1]	County or SMA percentage [2]		
		Name	SMA	County
Texas City, Tex.	35.8	Galveston, Tex.	12.2	
Coatesville, Pa.	32.9	Philadelphia, Pa.	1.9	
Ottumwa, Iowa	27.3	Wapello County		26.5
Uniontown, Pa.	27.2	Fayette County		12.4
Texarkana, Ark.	25.3	Miller County		23.9
Marshalltown, Iowa	24.9	Marshall County		22.6
Council Bluffs, Iowa	24.2	Omaha, Nebr.	7.9	
Corpus Christi, Tex.	24.0	Corpus Christi, Tex.	22.6	
Ardmore, Okla.	23.4	Carter County		20.4
Iowa City, Iowa	18.9	Johnson County		16.6
Muskogee, Okla.	17.7	Muskogee County		16.5
Steubenville, Ohio	17.5	Wheeling-Steubenville	8.7	
Grand Forks, N. Dak.	17.1	Grand Forks County		14.4
Mason City, Iowa	16.6	Cerro Gordo County		15.6
Topeka, Kans.	16.4	Topeka, Kans.	16.1	
Baton Rouge, La.	16.0	Baton Rouge, La.	15.9	
Rochester, Minn.	15.9	Rochester, Minn.	15.4	
Dubuque, Iowa	15.4	Dubuque, Iowa	13.9	
Fort Smith, Ark.	15.4	Fort Smith, Ark.	14.7	
Little Rock, Ark.	15.2	Little Rock & North Little Rock, Ark.	13.2	
Fort Dodge, Iowa	14.8	Webster County		14.3
Springfield, Mo.	14.3	Springfield, Mo.	13.3	
Berwyn, Ill.	14.1	Chicago, Ill.	2.5	
Davenport, Iowa	14.1	Davenport, Moline, Rock Island	12.2	
Fargo, N. Dak.	13.9	Cass County		13.5
Altoona, Pa.	13.1	Altoona, Pa.	10.6	
Muskegon, Mich.	13.1	Muskegon County		12.0
Reading, Pa.	12.2	Reading, Pa.	10.7	
South Bend, Ind.	11.9	South Bend, Ind.	11.1	
Greensburg, Pa.	11.3	Pittsburgh, Pa.	2.5	
Bloomington, Ill.	11.0	McLean County		9.8
Kansas City, Kans.	10.7	Kansas City, Mo.	3.1	
Colorado Springs, Colo.	10.6	El Paso County		10.5
Elgin, Ill.	10.5	Chicago, Ill.	2.5	
Oklahoma City, Okla.	10.0	Oklahoma City, Okla.	10.1	

[1] Based on dollar values from DX DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, R. 5300-5652, 5780-5818, 7155-7313; GX 241D, R. 2014-2365.

[2] Total area dollar estimates of footwear sales from GX 242, R. 2807-2819, and DX UUUUUU, R. 7155-7313. Area dollar sales of footwear by Brown and Kinney owned or controlled outlets from DDDD-1, DDDD-2, NNNN, UUUUUU, R. 4939-5299, 5300-5652, 5780-5818, 7155-7313; GX241D, R. 2014-2365.

MR. JUSTICE CLARK, concurring.

I agree that so long as the Expediting Act, 15 U. S. C. § 29, is on the books we have no alternative but to accept jurisdiction in this case. The Act declares that appeals in civil antitrust cases in which the United States is complainant lie only to this Court. It thus deprives the parties of an intermediate appeal and this Court of the benefit of consideration by a Court of Appeals. Under our system a party should be entitled to at least one appellate review, and since the sole opportunity in cases under the Expediting Act is in this Court we usually note jurisdiction. A fair consideration of the issues requires us to carry out the function of a Court of Appeals by examining the whole record and resolving all questions, whether or not they are substantial. This is a great burden on the Court and seldom results in much expedition, as in this case where 2½ years have passed since the District Court's decision.

On the merits the case presents the question of whether, under § 7 of the Clayton Act, the acquisition by Brown of the Kinney retail stores may substantially lessen competition in shoes on a national basis or in any section of the country.* To me § 7 is definite and clear. It prohibits acquisitions, either of stock or assets, where competition in *any* line of commerce in *any* section of the country may be substantially lessened. The test as stated in the Senate Report on the bill is whether there is "a reasonable probability" that competition *may* be lessened.

An analysis of the record indicates (1) that Brown, which makes all types of shoes, is the fourth largest manufacturer in the country; (2) that Kinney likewise manufactures some shoes but deals primarily in retailing, having almost 400 stores that handle a substantial volume

*Since the judgment below can be supported on this theory, there is no need to inquire into any tendency to create a monopoly.

of sales; (3) that its acquisition would give Brown a total of some 1,600 retail outlets, making it the second largest retailer in the Nation; (4) that Kinney's stores are on both a national and local basis strategically placed from a retail market standpoint in suburban areas or towns of over 10,000 population; (5) that Kinney's suppliers are small shoe manufacturers; (6) that Brown's earlier acquisitions, seven in number in five years, indicate a pattern to increase the sale of Brown shoes through the acquisition of independent outlets, resulting in the loss of sales by small competing manufacturers; (7) that statistics on these outlets indicate that Brown, after acquisition, has materially increased its shipments of Brown shoes to them, some as much as 50%; and (8) that the acquisition would have a direct effect on the small manufacturers who previously enjoyed the Kinney requirements market.

It would appear that the relevant line of commerce would be shoes of all types. This is emphasized by the nature of Brown's manufacturing activity and its plan to integrate the Kinney stores into its operations. The competition affected thereby would be in the line handled by these stores which is the full line of shoes manufactured by Brown. This conclusion is more in keeping with the record as I read it and at the same time avoids the charge of splintering the product line. Likewise, the location of the Kinney stores points more to a national market in shoes than a number of regional markets staked by artificial municipal boundaries. Brown's business is on a national scale and its policy of integration of manufacturing and retailing is on that basis. I would conclude, therefore, that it would be more reasonable to define the line of commerce as shoes—those sold in the ordinary retail store—and the market as the entire country.

On this record but one conclusion can follow, *i. e.*, that the acquisition by Brown of the 400 Kinney stores for the purposes of integrating their operation into its manufacturing activity created a "reasonable probability" that competition in the manufacture and sale of shoes on a national basis might be substantially lessened. I would therefore affirm.

MR. JUSTICE HARLAN, dissenting in part and concurring in part.

I would dismiss this appeal for lack of jurisdiction, believing that the case in its present posture is prematurely here because the judgment sought to be reviewed is not yet final. Since the Court, however, holds that the case is properly before us, I consider it appropriate, after noting my dissent to this holding, to express my views on the merits because the issues are of great importance. On that aspect, I concur in the judgment of the Court but do not join its opinion, which I consider to go far beyond what is necessary to decide the case.

JURISDICTION.

The Court's authority to entertain this appeal depends on § 2 of the Expediting Act of 1903. That statute, in its present form, provides (15 U. S. C. § 29):

> "In every civil action brought in any district court of the United States under any of said [antitrust] Acts, wherein the United States is complainant, an appeal from the *final* judgment of the district court will lie *only* to the Supreme Court." (Emphasis added.)

The Act was passed by a Congress which thereby "sought . . . to ensure speedy disposition of suits in equity brought by the United States under the Anti-

Trust Act." *United States* v. *California Cooperative Canneries,* 279 U. S. 553, 558. This major policy consideration emerges clearly from the otherwise meager legislative history of the Act. See H. R. Rep. No. 3020, 57th Cong., 2d Sess. (1903); 36 Cong. Rec. 1679, 1744, 1747. It was in keeping with this purpose that "Congress limited the right of review to an appeal from the decree which disposed of all matters . . . and . . . precluded the possibility of an appeal to either [the Supreme Court or the Court of Appeals] . . . from an interlocutory decree." *United States* v. *California Cooperative Canneries, supra.* For it was entirely consistent with its desire to expedite these cases for Congress to have eliminated the time-consuming delays occasioned by interlocutory appeals either to intermediate courts or to this Court.

By taking jurisdiction over this appeal at the present time, despite the fact that, even if affirmed, this case would doubtless reappear on the Court's docket if the terms of the District Court's divestiture decree are unsatisfactory to the appellant or to the Government, the Court is paving the way for dual appeals in all government antitrust cases where intricate divestiture judgments are involved. Whether or not such a procedure is advisable from the standpoint of judicial administration or practical business considerations—and I think such questions by no means free from doubt—I believe that it is contrary to the provisions and purposes of the Expediting Act, and that the construction now given the Act does violence to the accepted meaning of "final judgment" in the federal judicial system.

The judgment from which this appeal is taken directs the appellant to "relinquish and dispose of the stock, share capital and assets" of the G. R. Kinney Company and enjoins further interlocking interests between the two corporations. It does not specify how the divestiture is to be carried out, but directs appellant to file "a proposed

plan to carry into effect the divestiture order" and grants the Government 30 days following such filing in which to submit "opposition or suggestions thereto." When considered in light of the District Court's opinion, this reservation emerges as much more than a mere retention of jurisdiction for the purpose of ministerially executing a definite and precise final judgment. See, *e. g., Ray* v. *Law,* 3 Cranch 179; *French* v. *Shoemaker,* 12 Wall. 86, 98. In light of this Court's remarks in *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 607–608, the District Court concluded that the particular form which the divestiture order was to take was a matter which "could have far-reaching effects and consequences," 179 F. Supp., at 741, and that it would be appropriate for the court to conduct hearings on the manner in which the Kinney stock ought to be disposed of by the appellant. Hence it is not farfetched to assume that particular terms of the remedy ordered by the District Court will be contested, and that this Court may well be asked to examine the details relating to the anticipated divestiture. *E. g., United States* v. *E. I. du Pont de Nemours & Co.,* 366 U. S. 316.

The exacting obligation with respect to the terms of antitrust decrees cast upon this Court by the Expediting Act was commented upon only last Term. In *United States* v. *E. I. du Pont de Nemours & Co.,* 366 U. S. 316, it was noted that it was the Court's practice, "particularly in cases of a direct appeal from the decree of a single judge, . . . to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violation proved." 366 U. S., at 323; see *International Boxing Club, Inc.,* v. *United States,* 358 U. S. 242, 253. In the present case the Court and the parties know nothing more of "this most significant phase of the case," *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 89, than that Brown will generally be

required to divest itself of any interest in Kinney. Exactly how this separation is to be accomplished has not yet been determined, and there is no way of knowing now whether both parties to the suit will find the decree satisfactory or whether one or both will seek further review in this Court.

Despite the opportunity thus created for separate reviews of these kinds of cases at their "merits" and "relief" stages, the Court holds that the judgment now in effect has "sufficient indicia of finality" (*ante*, p. 308) to render it appealable now, notwithstanding that the terms of the ordered divestiture have not yet been fixed. This conclusion is based upon three discrete considerations, none of which, in my opinion, serves to overcome the "final judgment" requirement of the Expediting Act, as that term has hitherto been understood in federal law.[1]

First. The Court suggests that any further proceedings to be conducted in the District Court are "sufficiently independent of, and subordinate to, the issues presented by this appeal" to permit them to be considered and reviewed separately. But this judicially created exception to the embracing principle of finality has never heretofore been utilized by this Court to permit separate review of a District Court's decision on the underlying merits of a claim when the details of the relief that is to be awarded are yet uncertain. The present case does not present the possibility, as did *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, and *Forgay* v. *Conrad*, 6 How. 201, that a delay in appellate review would result in irreparable

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[1] "A final judgment is one which disposes of the whole subject, gives all the relief that was contemplated, provides with reasonable completeness, for giving effect to the judgment and leaves nothing to be done in the cause save to superintend, ministerially, the execution of the decree." *City of Louisa* v. *Levi*, 140 F. 2d 512, 514. See, *e. g.*, *Grant* v. *Phoenix Ins. Co.*, 106 U. S. 429; *Taylor* v. *Board of Education*, 288 F. 2d 600.

harm, equivalent in effect to a denial of any review on the point at issue. See 337 U. S., at 546; 6 How., at 204. Nor is this a case in which the complaint's prayers for relief are so diversified that the resolution of one branch of the case "is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120, 126; see *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 372–373; *Forgay* v. *Conrad*, *supra*.

If the appellant were compelled to await the entry of a particularized divestiture order before being granted appellate review, it would suffer no irremediable loss; indeed, in this case the merger was allowed to proceed *pendente lite*, so any delay, to the extent that it could affect the parties, would benefit the appellant. Nor can it well be suggested that the particular conditions under which the divestiture is to be executed are matters that are only fortuitously "entangled" with the merits of the complaint. Despite the seemingly mandatory tone of the "divestiture" judgment now before us, the plain fact remains that it is *by its own terms* inoperative to a substantial extent until further proceedings are held in the District Court. Unlike the cases relied upon by the Court, therefore, this case comes up on appeal before the appellant knows exactly what it has been ordered to do or not to do. This is surely not the type of judgment "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U. S. 229, 233; see *Covington* v. *Covington First National Bank*, 185 U. S. 270, 277.

Second. The Court finds significant the "character of the decree still to be entered in this suit." *Ante*, p. 309. Since the order of full divestiture requires "careful, and often extended, negotiation and formulation," *ante*, p. 309, it is suggested that a delay in carrying out its terms might render them impractical or unenforceable. Apart

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from the fact that this policy consideration is more appropriately addressed to the Congress than to this Court, it appears to me to call for a result directly contrary to that reached by the Court. For if the terms of the divestiture are indeed so difficult to formulate and so interrelated with market conditions, it is most unlikely that the decree to be issued by the District Court will turn out to be satisfactory to both parties. Consequently, on the Court's own reasoning, a second appearance of this case on our docket is not an imaginative possibility but a reasonable likelihood. In stating that the divestiture portion of this judgment "is disputed here on an 'all or nothing' basis," and that "it is ripe for review now, and will, thereafter, be foreclosed," *ante*, p. 309, the Court can hardly mean that either the appellant or the Government will be precluded from seeking review of the divestiture terms if it deems them unsatisfactory. Indeed, neither side on this appeal has addressed itself to the propriety of the divestiture remedy, as such, that is independently of the question whether the merger itself runs afoul of the Clayton Act.

Moreover, if it is delay between formulation of the decree and its execution that is thought to be damaging, what reason is there to believe that this delay or its hazards will be any greater if the entire case is brought up here once than if review is separately sought from the divestiture decree once its terms have been settled? Nor can it be maintained that if the merits are now affirmed then an appeal on the question of relief is improbable. For insofar as complex "negotiation and formulation" is a factor, the probability of an appeal is equally likely in either instance.

Third. The Court's final reason for holding this judgment appealable is that similar judgments have often been reviewed here in the past with no issue ever having been raised regarding jurisdiction. But the cases are

legion which have echoed the answer given by Chief Justice Marshall to a contention that the Court was bound on a jurisdictional point by its consideration on the merits of a case in which the jurisdictional question had gone unnoticed: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio,* and the court does not consider itself as bound by that case." *United States* v. *More,* 3 Cranch 159, 172; see *Snow* v. *United States,* 118 U. S. 346, 354; *Cross* v. *Burke,* 146 U. S. 82, 87; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 236; *New* v. *Oklahoma,* 195 U. S. 252, 256; *United States ex rel. Arant* v. *Lane,* 245 U. S. 166, 170; *Stainback* v. *Mo Hock Ke Lok Po,* 336 U. S. 368, 379; *United States* v. *L. A. Tucker Truck Lines,* 344 U. S. 33, 38. The fact that the Court may, in the past, have overlooked the lack of finality in some of the judgments that came here for review in similar posture to this one does not now free it from the requirements of the Expediting Act. Nor does the fact that none of the cases reviewed in what now appears to have been an interlocutory stage was ever appealed again justify disregard of the statute. This history might point to the desirability of an amendment to the Expediting Act, but it does not make into a "final judgment" a decree which reserves for future determination the terms of the precise relief to be afforded.

The Court suggests that a "pragmatic approach" to finality is called for in light of the policies of the Federal Rules of Civil Procedure, which direct the "just, speedy, and inexpensive determination of every action." *Ante,* p. 306. But this misconceives the nature of the issue that is presented. Whether this judgment is final and appealable is not a question turning on the Federal Rules of Civil Procedure or on any balance of policies by this Court. Congress has seen fit to make this Court, for reasons which are less than obvious, the sole appellate tribunal for civil antitrust suits instituted by the United

States. In so doing, it has chosen to limit this Court's reviewing power to "final judgments." Whether the first of these legislative determinations, made in 1903, when appeal as of right to this Court was the rule rather than the exception, should survive the expansion in the Court's docket and the development, pursuant to the Judiciary Act of 1925, of this Court's discretionary certiorari jurisdiction, may never have been given adequate consideration by the Congress.[2]

At this period of mounting dockets there is certainly much to be said in favor of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single district judge's findings of fact are supportable. The legal issues in most civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law. And under modern conditions it may well be doubted whether direct review of such cases by this Court truly serves the purpose of expedition which underlay the original passage of the Expediting Act. I venture to predict that a critical reappraisal of the problem would lead to the conclusion that "expedition" and also, over-all, more satisfactory appellate review would be achieved in

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[2] For example, the report which accompanied the 1925 Act to the floor of the Senate said of the cases in which direct appeal from a District Court to the Supreme Court was retained: "As is well known, there are certain cases which, under the present law, may be taken directly from the district court to the Supreme Court. Without entering into a description of these four classes of cases, it is sufficient to say that under the existing law *these are cases which must be heard by three judges,* one of whom is a circuit judge." S. Rep. No. 362, 68th Cong., 1st Sess. 3 (1924). (Emphasis added.) This generalization was obviously erroneous since the Expediting Act provided for direct review in this Court of government antitrust cases decided by a single district judge.

these cases were primary appellate jurisdiction returned to the Court of Appeals, leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review. As things now stand this Court must deal with *all* government civil antitrust cases, often either at the unnecessary expenditure of its own time or at the risk of inadequate appellate review if a summary disposition of the appeal is made. Further, such a jurisdictional change would bid fair to satisfy the very "policy" arguments suggested by the Court in this case. For the Courts of Appeals, whose dockets are generally less crowded than those of this Court, would then be authorized to hear appeals from orders such as the one here in question. Since this order grants an injunction against interlocking interests between Brown and Kinney, it would come within 28 U. S. C. § 1292 (a)(1) were this not a case "where a direct review may be had in the Supreme Court."

So long, however, as the present Expediting Act continues to commend itself to Congress this Court is bound by its limitations, and since for the reasons already given the decree appealed cannot, in my opinion, be properly considered a "final judgment," I think the appeal, at this juncture, should have been dismissed.

THE MERITS.

Since the Court nonetheless holds that the judgment is appealable in its present form, and since the underlying questions are far-reaching, I consider it a duty to express my view on the merits. On this aspect of the case I join the disposition which affirms the judgment of the District Court, though I am not prepared to subscribe to all that is said or implied in the opinion of this Court.

The question presented by this case can be stated in narrow and concise terms: Are the District Court's conclusions that the effect of the Brown-Kinney merger may

be, in the language of § 7 of the Clayton Act, "substantially to lessen competition, or to tend to create a monopoly" in "any line of commerce in any section of the country" sustainable? In other words, does the indefinite and general language in § 7 manifest a congressional purpose to proscribe a combination of this sort? Brown contends that in finding the merger illegal the District Court lumped together what are in fact discrete "lines of commerce," that it failed to define an appropriate "section of the country," and that when the case is properly viewed any lessening of competition that may be caused by the merger is not "substantial." For reasons stated below, I think that each of these contentions is untenable.

The dispositive considerations are, I think, found in the "vertical" effects of the merger, that is, the effects reasonably to be foreseen from combining Brown's manufacturing facilities with Kinney's retail outlets. In my opinion the District Court's conclusions as to such effects are supported by the record, and suffice to condemn the merger under § 7, without regard to what might be deemed to be the "horizontal" effects of the transaction.

1. *"Line of Commerce."*—In considering both the horizontal and vertical aspects of this merger, the District Court analyzed the probable impact on competition in terms of three relevant "lines of commerce"—men's shoes, women's shoes, and children's shoes. It rejected Brown's claim that shoes of different construction or of different price range constituted distinct lines of commerce. Whatever merit there might be to Brown's contention that the product market should be more narrowly defined when it is viewed from the vantage point of the ultimate consumer (whose pocketbook, for example, may limit his purchase to a definite price range), the same is surely not true of the shoe manufacturer. Although the record contains evidence tending to prove that a shoe manufacturing

plant may be managed more economically if its production is limited to only one type and grade of shoe, the history of Brown's own factories reveals that a single plant may be used in successive years, or even at the same time, for the manufacture of varying grades of shoes and may, without undue difficulty, be shifted from the production of children's shoes to men's or women's shoes, or vice versa.

Because of this flexibility of manufacture, the product market with respect to the merger between Brown's manufacturing facilities and Kinney's retail outlets might more accurately be defined as the complete wearing-apparel shoe market, combining in one the three components which the District Court treated as separate lines of commerce. Such an analysis, taking into account the interchangeability of production, would seem a more realistic gauge of the possible anticompetitive effects in the shoe manufacturing industry of a merger between a shoe manufacturer and a retailer than the District Court's compartmentalization in terms of the buying public. For if a manufacturer of women's shoes is able, albeit at some expense, to convert his plant to the production of men's shoes, the possibility of such a shift should be considered in deciding whether the market for either men's shoes or women's shoes can be monopolized or whether a particular merger substantially lessens competition among manufacturers of either product. See Adelman, Economic Aspects of the Bethlehem Opinion, 45 Va. L. Rev. 684, 689–691; cf. *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 510–511; but see *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 592.

The fact that § 7 speaks of the lessening of competition "in *any* line of commerce" (emphasis added) does not, of course, mean that the product market on which the effect of the merger is considered may be defined as narrowly

or as broadly as the Government chooses to define it.[3] The duty rests with the District Court, and ultimately with this Court, to determine what is the appropriate market on an appraisal of the relevant economic considerations. Discovering the product market is "a necessary predicate to a finding of a violation of the Clayton Act," *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593, and the breadth of the statutory language provides no license for an abdication of this necessary function. In light of the production flexibility demonstrated by the undisputed facts in this case, I think the line of commerce by which the vertical aspects of the Brown-Kinney merger should be judged is the wearing-apparel shoe industry generally.

2. *"Section of the Country."*—This merger involves nationwide concerns which sell and purchase shoes in various localities throughout the country, so that it appears that the most suitable geographical market for appraising the alleged anticompetitive effects of the vertical combination is the Nation as a whole. This finding of the District Court (limited to the vertical aspect of the merger) is not contested by Brown and is properly accepted here. One *caveat* is in order, however. In judging the anticompetitive effect of the merger on the national market, it must be recognized that any decline in competition that might result need not have a uniform effect throughout the entire country. It is sufficient if

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[3] As the Court noted in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 393, "one can theorize that we have monopolistic competition in every nonstandardized commodity with each manufacturer having power over the price and production of his own product." If the Government were permitted to choose its "line of commerce" it could presumably draw the market narrowly in a case that turns on the existence *vel non* of monopoly power and draw it broadly when the question is whether both parties to a merger are within the same competitive market.

the record proves that as a result of the merger competition will generally be lessened, though its most serious impact may be felt in certain localities.

3. *"Substantially to Lessen Competition."*—The remaining question is whether the merger of Brown's manufacturing facilities with Kinney's retail outlets "may . . . substantially lessen competition" or "tend to create a monopoly" in the nationwide market in which shoe manufacturers sell to shoe retailers. The findings of the District Court, supported by the evidence, when taken together with undisputed facts appearing in the record, justify the conclusion that a substantial lessening of competition in the relevant market is a "reasonable probability." S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).

On the date of the merger Kinney's retail stores numbered 352, and this figure had increased to more than 400 by the time of the trial. Nearly all these stores sell men's, women's, and children's shoes and are located in the downtown areas of cities of at least 10,000 population. In 116 of these cities, Kinney's combined pairage sale of shoes for 1955 exceeded 10% of all shoes sold in the city during the year. Its total retail shoe sales during the year constituted 1.2% of the national total in terms of dollar volume and 1.6% in terms of pairage. Of these shoes, only 20% were supplied by the Kinney manufacturing plants, the remainder coming from some 197 other sources.[4]

Prior to 1955 Kinney had bought none of its outside-source shoes from Brown, and its records for 1955 reveal that the year's purchases were made from a diverse number of independent shoe manufacturers. There were 66 suppliers (including Brown) in that year each of whose total sales to Kinney exceeded $50,000, and only three of

[4] The schedule in the record of Kinney's outside shoe suppliers for the calendar year 1955 lists 319 vendors, but 122 of these supplied less than $1,000 worth of goods during the year.

these (Brown, Endicott-Johnson Co., and Georgia Shoe Manufacturing Co.) were large companies whose output placed them among the 25 most productive nonrubber shoe manufacturers in the United States. Consequently, it appears that Kinney was a substantial purchaser of the shoes produced by many small independent shoe manufacturers throughout the country. In fact, the record affirmatively shows that at least five of Kinney's suppliers, three of which are located in the State of New York, one in Pennsylvania, and one in New Hampshire, each relied upon Kinney to purchase more than 40% of its total production in 1955.

That the merger between Brown's shoe production plants and Kinney's retail outlets will tend to foreclose some of the large market which smaller shoe manufacturers found in sales to Kinney hardly seems open to doubt. This conclusion is supported by the following facts which emerge indisputably from the record: (1) In the shoe industry, as in many others, the purchase of a retail chain by a manufacturer results in an increased flow of the purchasing manufacturer's shoes to the retail store. Hence independent shoe manufacturers find it more difficult to sell their shoes to an acquired retail chain than to an independent one. (2) The result of Brown's earlier acquisition of two retail chains was, in each instance, a substantial increase in the quantity of Brown shoe purchases by the previously independent chains.[5]

[5] In 1951 Brown purchased the Wohl Shoe Company, which operated leased shoe departments in department stores throughout the country. Before its acquisition of Wohl, Brown had supplied 12.8% of Wohl's shoe requirements; by 1957, it was supplying 33.6% of Wohl's needs.

In 1953, Brown purchased a partial interest in a small chain of retail stores in Los Angeles known as Wetherby-Kayser. Before this purchase, Brown had supplied 10.4% of Wetherby's shoes; within one year this percentage increased to almost 50%.

(3) The history of many of Brown's plants proves that they may be readily adapted to the production of the grade and style of shoes customarily sold in Kinney stores.[6] (4) Although Brown supplied none of Kinney's requirements before the merger, it was supplying almost 8% of these requirements just two years thereafter.

The dollar volume of Kinney's outside shoe purchases in 1955 was between 16 and 17 million dollars, and this amount had increased to 19.4 million by 1957. While Kinney was making only about 1.2% of the total retail dollar sales in the United States in 1955, that percentage can hardly be deemed an accurate reflection of its proportion of nationwide shoe *purchases* by retailers since the retail-sales figure is based on a computation that includes *all* retail stores, whether or not they were vertically integrated or otherwise affiliated. In terms of available markets for independent shoe manufacturers, the percentage of Kinney's purchases must have been substantially larger—though the precise figure is unavailable on the record before us.[7]

If the controlling test were, as it may be under the similar language of § 3 of the Clayton Act, one of "quanti-

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[6] In addition, it appears from the record that shortly after the merger was effected, Kinney abandoned its earlier policy of selling only Kinney-brand shoes (80% of which were "made up" for it by its manufacturers) and began selling a considerable number of Brown's branded and advertised shoes. Along with the indications in the record that Kinney was beginning also to sell higher-priced shoes in its suburban outlets, this suggests that Brown could supply much of Kinney's needs with only a minimal additional capital investment.

[7] The existence of such gaps in the record make a fair assessment of the effects of this merger more difficult than it would otherwise be. One of the reasons why I would not consider the horizontal aspect of this merger is my conviction that the data supplied by the Government is entirely inadequate for a proper evaluation of the impact of the horizontal merger on competition.

tative substantiality," compare *Standard Oil Co.* v. *United States*, 337 U. S. 293, with *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, the probable foreclosure of independent manufacturers from this substantial share of the available retail shoe market would be enough to render the vertical aspect of this merger unlawful under § 7. But since the merger can be shown to have an injurious effect on competition among manufacturers and among retailers, it is unnecessary to consider whether the *Standard Stations* formula is applicable.

The vertical affiliation between this shoe manufacturer and a primarily retail organization is surely not, as the dissenters thought the contractual tie in *Standard Stations* to be, "a device for waging competition" rather than "a device for suppressing competition." 337 U. S., at 323. Since Brown is able by reason of this merger to turn an independent purchaser into a captive market for its shoes it inevitably diminishes the available market for which shoe manufacturers compete. If Brown shoes replace those which had been previously produced by others, the displaced manufacturers have no choice but to enter some other market or go out of business. Since all manufacturers, including Brown, had competed for Kinney's patronage when it was unaffiliated, Brown's merger with Kinney potentially withdraws a share of the market previously available to the independent shoe manufacturers.

Not only may this merger, judged from a vertical standpoint, affect manufacturers who compete with Brown; it may also adversely affect competition on the retailing level. With a large manufacturer such as Brown behind it, the Kinney chain would have a great competitive advantage over the retail stores with which it vies for consumer patronage. As a manufacturer-owned outlet, the Kinney store would doubtless be able to sell its shoes at a

lower profit margin and outlast an independent competitor. The merger would also effectively prevent the retail competitor from dealing in Brown shoes, since these might be offered at lower prices in Kinney stores than elsewhere.[8]

Brown contends that even if these anticompetitive effects are probable, they touch upon an insignificant share of the market and are not, therefore, "substantial" within the meaning of § 7. Our decision in *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320, is cited as authority for the proposition that a foreclosure of about 1% of the relevant market is necessarily insubstantial. But the opinion in *Tampa Electric* carefully noted that "substantiality in a given case" depends on a variety of factors. 365 U. S., at 329. Two of the considerations that were mentioned were "the relative strength of the parties" and "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Ibid.* When, as here, the foreclosure of what may be considered a small percentage of retailers' purchases may be caused by the combination of the country's third largest seller of shoes with the country's largest family-style shoe store chain, and when the volume of the latter's purchases from independent manufacturers in various parts of the country is large enough to render it probable that these suppliers, if displaced, will have to fall by the wayside, it cannot, in my opinion, be said that the effect on the shoe industry is "remote" or "insubstantial."

I reach this result without considering the findings of the District Court respecting the trend in the shoe industry towards "oligopoly" and vertical integration. The

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[8] The change in Kinney policy whereby it now carries shoes bearing the Brown brand (see note 6, *supra*) tends to make retailer competition still more difficult.

statistics in the record fall short of convincing me that any such trend exists.[9] I consider the District Court's judgment warranted apart from these findings.

Accordingly, bowing to the Court's decision that the case is properly before us, I join the judgment of affirmance.

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[9] In terms of bare numbers, the quantity of retail outlets owned or controlled by the major manufacturers has undoubtedly been increasing since 1947. But much of the data in the record is incomplete in this regard because it is based on varying standards. Thus, while the Government argues that the increase in percentage of national retail sales by shoe chains owning 101 or more outlets from 20.9% in 1948 to 25.5% in 1954 proves the trend toward "oligopoly," the appellant's statistics, founded upon retail sales by *all* outlets (including general merchandise and clothing stores), show that retail sales by chains of 11 or more stood at a constant 19.5% of national dollar volume in both 1948 and 1954. Moreover, the apparent decline in the proportional share of the country's shoe needs supplied by the largest manufacturers between 1947 and 1955 belies any claim that shoe production is becoming "oligopolistic." Whereas the largest four manufacturers supplied 25.9% of the Nation's needs in 1947, the largest eight supplied 31.4%, and the largest 15 supplied 36.2%, in 1955 the equivalent percentages were 22%, 27%, and 32.5%.

There is no suggestion in the record as to whether earlier purchases of retail chains by shoe manufacturers reduced the number of independent manufacturers or otherwise harmed competition. Consequently, while the record does establish that manufacturers have been increasing the number of their retail outlets, it is entirely silent on the effects of this vertical expansion.

WOOD *v.* GEORGIA.

CERTIORARI TO THE COURT OF APPEALS OF GEORGIA.

No. 369. Argued March 29, 1962.—Decided June 25, 1962.

In the midst of a local political campaign, a County Judge, in the presence of representatives of news media assembled at the Judge's request, issued a charge to a grand jury giving it special instructions to investigate rumors and accusations of alleged bloc voting by Negroes and the rumored use of money by political candidates to obtain their votes. The next day, while the grand jury was in session, petitioner, an elected Sheriff who was a candidate for reelection, issued from his office in the same building a press statement criticizing the Judge's action and urging citizens to take notice when their judges threatened political intimidation and persecution of voters under the guise of law enforcement. Petitioner was cited in the County Court for contempt, on the ground that his statement was calculated to be contemptuous of the Court and to obstruct the grand jury in its investigation and that it constituted a "clear, present and imminent danger" to the administration of justice. Petitioner issued a further statement repeating substantially his earlier charges and asserting that his defense would be that he had spoken the truth. The contempt citation was then amended by the addition of another count based on this latter statement and a charge that it constituted a clear and present danger to the grand jury investigation and to the disposition of the contempt citation against him. Without making any findings or giving any reasons for its conclusion that his conduct actually obstructed the grand jury or contempt proceedings, the trial court adjudged petitioner guilty of contempt and sentenced him to fine and imprisonment. *Held:* The record does not support a finding that petitioner's statements presented a clear and present danger to the administration of justice; and his conviction violated his right to freedom of speech guaranteed by the First and Fourteenth Amendments. Pp. 376–395.

103 Ga. App. 305, 119 S. E. 2d 261, reversed.

Milton Kramer argued the cause for petitioner. With him on the briefs was *James I. Wood.*

E. Freeman Leverett, Deputy Assistant Attorney General of Georgia, argued the cause for respondent. With

him on the briefs were *Eugene Cook*, Attorney General, *William M. West*, Solicitor General, and *Jack J. Gautier*, Assistant Solicitor General.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

We granted certiorari to consider the scope of the constitutional protection to be enjoyed by persons when the publication of their thoughts and opinions is alleged to be in conflict with the fair administration of justice in state courts. The petitioner, an elected sheriff in Bibb County, Georgia, contends that the Georgia courts, in holding him in contempt of court for expressing his personal ideas on a matter that was presently before the grand jury for its consideration, have abridged his liberty of free speech as protected by the First Amendment and the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

On June 6, 1960, a judge of the Bibb Superior Court issued a charge to a regularly impaneled grand jury, giving it special instructions to conduct an investigation into a political situation which had allegedly arisen in the county. The jury was advised that there appeared to be "an inane and inexplicable pattern of Negro bloc voting" in Bibb County, and that "rumors and accusations" had been made which indicated candidates for public office had paid large sums of money in an effort to gain favor and to obtain the Negro vote. The charge explained that certain Negro leaders, after having met and endorsed a candidate, had switched their support to an opposing candidate who put up a large sum of money, and that this "create[d] an unhealthy, dangerous, and unlawful situation [which] tend[ed] to corrupt public office holders and some candidates for public office." The charge continued by indicating the violations of law which would be involved should the grand jury find the charges

to be founded in truth.[1] In addition, certain questions were posed to the jury which it was to investigate in inquiring into the charges of election law violations.[2]

[1] The Georgia Legislature has provided that it shall be a misdemeanor for any person to "[b]uy or sell, or offer to buy or sell, a vote, or [to] . . . be in any way concerned in buying or selling, or contribute money or any other thing of value for the purpose of buying a vote at any election . . . ." Ga. Code Ann., § 34–9907. See also Ga. Code Ann., § 34–1907, included in the court's charge.

[2] More fully, the charge, in relevant part, contained the following:

"GENTLEMEN OF THE GRAND JURY:

"The special instructions now about to be given to you were determined upon and formulated by all of the Judges of this Court en banc after joint consultations and are fully sanctioned by all the Judges.

. . . . . .

"A situation has arisen in Bibb County over the last few years which this Court feels should be thoroughly and completely investigated by the Grand Jury. . . .

"In election after election where no racial issues are involved, and where there are no other issues involved which could possibly cause any particular group to be honestly concerned about supporting or opposing any particular candidate, we find what appears an inane and inexpicable pattern of Negro bloc voting.

"Now there is an answer to the existing situation which should be brought to light so that people of this community may understand what is going on in some of our elections, and do something about it. The people are entitled to know how one candidate or another is able to gather to himself thousands of Negro votes in bloc where there is no apparent reason for it.

. . . . . .

"This Grand Jury is hereby instructed by the Court to investigate and examine into the facts of every election of every kind in this County for the past several years in which bloc voting is apparent. Although there are many intelligent and independent voters among the colored people who deplore this situation, it is nevertheless obvious that about 80% to 85% of the Negro voters engage in bloc voting. . . .

. . . . . .

". . . [T]he matter you are directed to investigate is the persistent rumors and accusations concerning the methods used in the solicita-

The instructions were given in the midst of a local political campaign and the judge, in order to publicize the investigation, requested reporters for all local news media

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tion of the Negro vote and the alleged bartering of the bloc vote. There are accusations that candidates for public office have paid large sums of money to certain leaders of the Negro in an effort to gain their favor and get the Negro vote. There are accusations that candidates and their supporters have paid, and these leaders of the Negroes have accepted, money for the purpose of influencing the Negro people to bloc vote for certain candidates. . . .

. . . . . .

"These rumors being circulated, and about which you have been charged, are either true or false and it is the duty of this Grand Jury to determine wherein the truth lies.

"Some questions which this Jury should have answered in your investigation of elections are: Was the Negro vote delivered in bloc to any candidate or candidates? If so, who delivered it and how was it done? What contact did the candidates or their supporters have with the Negro group or its leaders? What money was involved, if any? How was the money used? What workers were employed? What promises did the candidate make, if any, in order to obtain the bloc vote?

. . . . . .

"Now, gentlemen, it is your duty to develop the facts of this situation and if there is sufficient evidence of unlawful acts, then all parties participating, white and colored, candidates or non-candidates, should be indicted by this Grand Jury so that the guilty parties, if there are any, may be brought to trial.

"Furthermore, it is your duty to bring to light those practices which, while not technically in violation of any law, are yet so immoral or corrupt as to be destructive of the purposes of our system of elections. It is further your right and duty to determine what additional laws, or amendments to existing laws, are needed to adequately deal with the situation with which we are faced and to recommend enactment thereof by the Legislature.

"The enormity of the task assigned you by these instructions is recognized, but surely all good citizens, both public and private, who stand for good government and an honest elective system will be willing to come before this Grand Jury and disclose every fact concerning the matters about which you are being instructed."

to be present in the courtroom when the charge was delivered.

The following day, while the grand jury was in session investigating the matters set forth in the instructions delivered by the court, the petitioner issued to the local press a written statement in which he criticized the judges' action and in which he urged the citizenry to take notice when their highest judicial officers threatened political intimidation and persecution of voters in the county under the guise of law enforcement. This news release, which was published and disseminated to the general public, stated:

> "Whatever the Judges' intention, the action . . . ordering [the grand jury] . . . to investigate 'negro block voting' will be considered one of the most deplorable examples of race agitation to come out of Middle Georgia in recent years.
>
> "At a time when all thinking people want to preserve the good will and cooperation between the races in Bibb County, this action appears either as a crude attempt at judicial intimidation of negro voters and leaders, or, at best, as agitation for a 'negro vote' issue in local politics.
>
> "No one would question the duty of a Grand Jury to investigate any and all election law violations. However, simple justice would demand that the Judge not single out the negro people for particular investigation. . . .
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> . . . . .
>
> "Negro people will find little difference in principle between attempted intimidation of their people by judicial summons and inquiry and attempted intimidation by physical demonstration such as used by the K. K. K.

"It is hoped that the present Grand Jury will not let its high office be a party to any political attempt to intimidate the negro people in this community.

"It seems incredible that all three of our Superior Court Judges, who themselves hold high political office, are so politically nieve [naive] as to actually believe that the negro voters in Bibb County sell their votes in any fashion, either to candidates for office or to some negro leaders.

"If anyone in the community [should] be free of racial prejudice, it should be our Judges. It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office.

. . . . .

"However politically popular the judges action may be at this time, they are employing a practice far more dangerous to free elections than anything they want investigated. "James I. Wood."

The following day, the petitioner delivered to the bailiff of the court, stationed at the entrance to the grand jury room, "An Open Letter to the Bibb County Grand Jury," which was made available to the grand jury at petitioner's request. This letter, implying that the court's charge was false, asserted that in the petitioner's opinion, the Bibb County Democratic Executive Committee was the organization responsible for corruption in the purchasing of votes, and that the grand jury would be well-advised also to investigate that organization.

A month later, on July 7, 1960, the petitioner was cited in two counts of contempt based on the above statements. The citation charged that the language used by the petitioner was designed and calculated to be contemptuous of the court, to ridicule the investigation ordered by the charge, and "to hamper, hinder, interfere with and

obstruct" the grand jury in its investigation. It also alleged that the news release was issued from the Bibb County Sheriff's Office, located in the courthouse in which the grand jury had been charged and where it was deliberating, and that the language imputed lack of judicial integrity to the three judges of the court responsible for the charge. An amendment to the citation alleged that the statements "in and of [themselves] created . . . a clear, present and imminent danger to the investigation being conducted . . . and . . . to the proper administration of justice in Bibb Superior Court."

The next day the petitioner issued a further press release in which he repeated substantially the charges he had made in the release on June 7, and in which he asserted that his defense to the contempt citation would be that he had spoken the truth. The contempt citation was thereupon amended by including a third count based on this latter statement. The third count contained the same allegations as the other counts and, in addition, charged that the petitioner's action presented a clear and present danger to the handling of the contempt citation against the petitioner.

At a hearing before the trial judge,[3] certain facts were stipulated: that the petitioner's statements were made while the grand jury was in session investigating matters suggested in the charge by the court; that the grand jury had before it the voting tabulations and other documents, including endorsements by certain political groups relating to primaries and elections in which the petitioner participated as a candidate and as an active supporter for other candidates; and that the members of the grand jury and the judges themselves had seen and read the

[3] The charge that was delivered to the grand jury was prepared by the three judges of the Bibb County Superior Court, and was delivered by one of them. Another one of the three presided at petitioner's contempt hearing.

press releases issued by the petitioner. In addition, it was stipulated that the petitioner's sworn response be admitted as evidence. The allegations in this response, which must be considered as true in the absence of contrary evidence and in the absence of findings of fact by the trial judge, included the verification that the statements were made by petitioner in his capacity as a private citizen and not as sheriff of the county; that petitioner was directly and personally interested in the outcome of the current primary election not only as a private citizen but also as an announced candidate for public office in the general election to be held the following November, and in which election the petitioner would be running against the contestant who prevailed in the democratic primary; that he believed the language employed in the charge was of such a nature that it tended to create or emphasize issues likely to have a drastic impact upon the outcome of the primary; that his purpose in issuing the statements was simply to inform the public of what he sincerely believed to be the other side of the issue created by the charge; and that the statements were not intended to be contemptuous of the court or to hinder the investigation. The petitioner also asserted that he adopted the same method of distributing his views to the general public as did the court in disseminating the grand jury charge. No witnesses were presented at the hearing and no evidence was introduced to show that the publications resulted in any actual interference or obstruction of the court or the work of the grand jury. The gravamen of the contempt citation, and of the State's case against the petitioner, was that the mere publishing of the news release and defense statement constituted a contempt of court, and in and of itself was a clear and present danger to the administration of justice.

The trial court, without making any findings and without giving any reasons, adjudged petitioner guilty on all

counts and imposed concurrent sentences of 20 days and separate fines of $200 on each. On writ of error to the Court of Appeals the convictions on counts one and three were affirmed and the conviction on count two, based on the open letter to the grand jury, was reversed. *Wood* v. *Georgia,* 103 Ga. App. 305, 119 S. E. 2d 261. After the Georgia Supreme Court, without opinion, declined to review the convictions on the first and third counts, the petitioner sought a writ of certiorari to this Court which we granted. 368 U. S. 894.

We start with the premise that the right of courts to conduct their business in an untrammeled way lies at the foundation of our system of government and that courts necessarily must possess the means of punishing for contempt when conduct tends directly to prevent the discharge of their functions. While courts have continuously had the authority and power to maintain order in their courtrooms and to assure litigants a fair trial, the exercise of that bare contempt power is not what is questioned in this case. Here it is asserted that the exercise of the contempt power, to commit a person to jail for an utterance out of the presence of the court, has abridged the accused's liberty of free expression. In this situation the burden upon this Court is to define the limitations upon the contempt power according to the terms of the Federal Constitution.

In *Bridges* v. *California,* 314 U. S. 252, this Court for the first time had occasion to review a State's exercise of the contempt power utilized to punish the publisher of an out-of-court statement. The accused contended that the exercise abridged his right of free speech guaranteed against state infringement by the Fourteenth Amendment.[4] To determine the scope of this constitutional

[4] *Thornhill* v. *Alabama,* 310 U. S. 88, 95; *Schneider* v. *State,* 308 U. S. 147, 160; *De Jonge* v. *Oregon,* 299 U. S. 353; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Gitlow* v. *New York,* 268 U. S. 652, 666.

protection, the Court reviewed the history of the contempt power, both in England and in this country. It held that "the only conclusion supported by [that] history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." *Id.*, at 265.[5] Thus clarifying the exercise of this judicial power in the context of the protections assured by the First Amendment, the Court held that out-of-court publications were to be governed by the clear and present danger standard, described as "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.*, at 263.[6] Subsequently, in *Pennekamp* v. *Florida*, 328 U. S. 331, after noting that "[f]ree discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve" (*id.*, at 346), the Court reaffirmed its belief that the "essential right of the courts to be free of intimidation and coercion . . . [is] consonant with a recognition that freedom of the press must

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[5] Specifically, the Court, after a thorough review of the history behind both the exercise of the contempt power and the adoption of the First Amendment, rejected the idea that the interests were to be accommodated by applying the common law of England at the time the Constitution was adopted. *Bridges* v. *California*, 314 U. S. 252, 263–268. For source materials on this subject, see Chafee, Free Speech in the United States (1941), c. 1; Fox, The History of Contempt of Court (1927), *passim;* Stansbury, Trial of James H. Peck (1833), *passim;* Thayer, Legal Control of the Press (3d ed. 1956), 483 *et seq.* See also Deutsch, Liberty of Expression and Contempt of Court, 27 Minn. L. Rev. 296 (1943); Nelles and King, Contempt by Publication in the United States, 28 Col. L. Rev. 401, 525 (1928).

[6] The Court went on to say that the clear and present danger standard does not "purport to mark the furthermost constitutional boundaries of protected expression . . . [and that it does] no more than recognize a minimum compulsion of the Bill of Rights." *Bridges* v. *California, supra,* at 263.

be allowed in the broadest scope compatible with the supremacy of order." *Id.*, at 334.[7] The Court's last occasion to consider the application of the clear and present danger principle to a case of the type under review was in *Craig* v. *Harney*, 331 U. S. 367. There the Court held that to warrant a sanction "[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Id.*, at 376.[8]

It is with these principles in mind that we consider the case before us. Initially, however, it should be noted that the Georgia courts have determined that the power to punish for contempt of court is inherent in its state judiciary[9] and the Court of Appeals thus ignored the express limitations imposed by the Georgia Legislature in punishing out-of-court statements.[10] This holding thus

[7] In *Pennekamp* the Court concluded that "the danger under . . . [the] record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it." 328 U. S., at 350.

[8] In none of these cases, as is also true of the one presently under review, did the Court find it necessary to determine the full power of the State to protect the administration of justice by use of the contempt power. See *Craig* v. *Harney*, 331 U. S., at 373.

[9] *Atlanta Newspapers, Inc.*, v. *State*, 216 Ga. 399, 116 S. E. 2d 580; *McGill* v. *State*, 209 Ga. 500, 74 S. E. 2d 78; *Bradley* v. *State*, 111 Ga. 168, 36 S. E. 630. But see *Townsend* v. *State*, 54 Ga. App. 627, 188 S. E. 560.

[10] The state legislature has enacted a statute designed to limit the courts in that State in the exercise of the contempt power. Ga. Code Ann., § 24–105, provides:

"Powers of courts to punish for contempt.—The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the dis-

deprives the judgment of coming to this Court "encased in the armor wrought by prior legislative deliberation," *Bridges* v. *California, supra,* at 261, and it is upon this basis that we proceed.

This case differs from *Bridges* and *Pennekamp,* first, in that the court below has upheld petitioner's conviction on the basis that his conduct presented a clear and present danger to the proceedings of the court and grand jury, a standard this Court has held to warrant punishment for alleged contemptuous conduct. But state courts may not preclude us from our responsibility to examine "the evidence to see whether it furnishes a rational basis for the characterization put on it" (*In re Sawyer,* 360 U. S. 622, 628) by the enunciation of a constitutionally acceptable standard in describing the effect of the conduct. The ultimate responsibility to define the limits of state power regarding freedom of speech and expression rests with this Court, *Pennekamp* v. *Florida, supra,* at 335; see *Chambers* v. *Florida,* 309 U. S. 227, 228–229; *Fiske* v. *Kansas,* 274 U. S. 380, 385–386; and when it is claimed that such liberties have been abridged, we cannot allow a presumption of validity of the exercise of state power to interfere with our close examination of the substantive claim presented.[11]

Despite its conclusion that the petitioner's conduct created a serious evil to the fair administration of justice,

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obedience or resistance by any officer of said courts, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts . . . ."

Compare the legislative determination made by the State of California discussed briefly in *Bridges* v. *California, supra,* at 260–261, n. 3.

[11] When the claim is that such a right has been abridged by a state court, "it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." *Norris* v. *Alabama,* 294 U. S. 587, 590. See *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659; *Truax* v. *Corrigan,* 257 U. S. 312, 325.

the Court of Appeals did not cite or discuss the *Bridges, Pennekamp* or *Harney* cases, nor did it display an awareness of the standards enunciated in those cases to support a finding of clear and present danger.[12] It simply adopted as conclusions of law the allegations made in the contempt citation. The court did not indicate in any manner *how* the publications interfered with the grand jury's investigation, or with the administration of justice. Unlike those cases in which elaborate findings have been made to support such a conclusion,[13] this record is barren of such findings. The prosecution called no witnesses to show that the functioning of the jury was in any way disturbed; no showing was made that the members of the grand jury, upon reading the petitioner's comments in the newspapers, felt unable or unwilling to complete their assigned task because petitioner "interfered" with its completion.[14] There is nothing in the record to indicate that the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure. And to the extent that the conviction on the third count was upheld because petitioner's last statement presented a clear and present danger to the contempt hearing, it is indeed novel that under the circumstances of this case the petitioner might be responsible for a substantial inter-

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[12] Compare the findings of the Court of Criminal Appeals of Texas in *Ex parte Craig*, 150 Tex. Cr. 598, 193 S. W. 2d 178. See this Court's discussion of these findings and of the conclusion drawn by the Texas court on the basis of those findings, *Craig* v. *Harney*, 331 U. S. 367, 370–371, 385–389.

[13] See, *e. g., Toledo Newspaper Co.* v. *United States*, 247 U. S. 402, 414–416.

[14] Georgia law presumably permits grand jurors to so testify: "Grand jurors shall disclose everything which occurs in their service whenever it becomes necessary in any court of record in this State." Ga. Code Ann., § 59–302.

ference with his contempt hearing because he had made public his defense to the charges made against him. What interference to petitioner's hearing or what harm this assertion might inflict on the administration of justice is not stated in the opinion. Nor is there any evidence of either in the record.[15]

Thus we have simply been told, as a matter of law without factual support, that if a State is unable to punish persons for expressing their views on matters of great public importance when those matters are being considered in an investigation by the grand jury, a clear and present danger to the administration of justice will be created. We find no such danger in the record before us. The type of "danger" evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification. "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth." *Thornhill* v. *Alabama*, 310 U. S. 88, 95. In *Thornhill* the Court also reiterated the thinking of the Founders when it said that a broad conception of the First Amendment is necessary

> "to supply the public need for information and education with respect to the significant issues of the times. [Footnote omitted.] . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Id.*, at 102.[16]

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[15] Compare *Toledo Newspaper Co.* v. *United States*, *supra*, note 13, at 425 (Holmes, J., dissenting).

[16] See also *Lovell* v. *City of Griffin*, 303 U. S. 444; *Stromberg* v. *California*, 283 U. S. 359. See generally 2 Bancroft, History of the United States (1885), 261.

Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated opinions may be exposed, of course, but not through punishment for contempt for the expression. Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgment of the rights of free speech and assembly. Cf. Mr. Justice Brandeis, concurring in *Whitney* v. *California,* 274 U. S. 357, 378. Hence, in the absence of some other showing of a substantive evil actually designed to impede the course of justice in justification of the exercise of the contempt power to silence the petitioner, his utterances are entitled to be protected.

The respondent attempts to distinguish this case from *Bridges* by offering, as support for the Georgia court's conclusion that the petitioner's conduct presented a clear and present danger to the administration of justice, the fact that here there was an alleged interference with a grand jury and not an attempt to influence or coerce a judge. In the circumstances of this case, we find this argument unpersuasive.

First, it is important to emphasize that this case does not represent a situation where an individual is on trial; there was no "judicial proceeding pending" in the sense that prejudice might result to one litigant or the other by ill-considered misconduct aimed at influencing the outcome of a trial or a grand jury proceeding. Compare *Smith* v. *Texas,* 311 U. S. 128; *Chambers* v. *Florida,* 309 U. S. 227; *Pierre* v. *Louisiana,* 306 U. S. 354; *Tumey* v. *Ohio,* 273 U. S. 510; and *Moore* v. *Dempsey,* 261 U. S. 86. Moreover, we need not pause here to consider the variant factors that would be present in a case involving a petit jury. Neither *Bridges, Pennekamp* nor *Harney* involved a trial by jury. In *Bridges* it was noted that "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper" (314

U. S., at 271), and of course the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation. Rather, the grand jury here was conducting a general investigation into a matter touching each member of the community.

Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[17] Particularly in matters of local political corruption and investigations is it important that freedom of communication be kept open and that the real issues not become obscured to the grand jury. It cannot effectively operate in a vacuum. It has been said that the "ancestors of our 'grand jurors' are from the first neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." 2 Pollock and Maitland, History of the English Law (2d ed. 1909), 642. The necessity to society of an independent and informed grand jury becomes readily apparent in the context of the present case. For here a panel of judges, themselves elected officers and charged under state law with the responsibility of instructing a grand jury to investigate political corruption, have exercised the contempt power to hold in contempt another elected representative of the people for publishing views honestly held and contrary to those contained in the charge. And, an

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[17] Orfield, Criminal Procedure from Arrest to Appeal (1947), 144–146. See *Hale* v. *Henkel*, 201 U. S. 43, 59–66. See generally Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev. 590 (1961).

effort by the petitioner to prove the truth of his allegations was rejected, the court holding irrelevant the truth or falsity of the facts and opinions expressed in the publications. 103 Ga. App. 305, 321, 119 S. E. 2d 261, 273. If the petitioner could be silenced in this manner, the problem to the people in the State of Georgia and indeed in all the States becomes evident.

The administration of the law is not the problem of the judge or prosecuting attorney alone, but necessitates the active cooperation of an enlightened public. Nothing is to be gained by an attitude on the part of the citizenry of civic irresponsibility and apathy in voicing their sentiments on community problems. The petitioner's attack on the charge to the grand jury would have been likely to have an impeding influence on the outcome of the investigation only if the charge was so manifestly unjust that it could not stand inspection.[18] In this sense discussion serves as a corrective force to political, economic and other influences which are inevitably present in matters of grave importance. The charge given to the jury indicated that the motivation for it was founded on rumor, but that the situation had existed for several years. Yet the charge was directed primarily against one group in the community and was given at the height of the highly important Democratic primary, in which, because of their elected positions, both the judges and the petitioner were interested personally and apart from their official status. The First Amendment envisions that persons be given the opportunity to inform the community of both sides of

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[18] Compare Mr. Justice Holmes, dissenting in *Gitlow* v. *New York*, 268 U. S. 652, 673. See also *Thornhill* v. *Alabama*, 310 U. S. 88; *Whitney* v. *California*, 274 U. S. 357; *Pennekamp* v. *Florida*, 328 U. S. 331, 370 (concurring opinion) ("To talk of a clear and present danger arising out of [every] . . . criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice").

the issue under such circumstances. That this privilege should not lightly be curtailed is ably expressed in a passage from Judge Cooley's 2 Constitutional Limitations (8th ed. 1927) 885, where he stated that the purpose of the First Amendment includes the need:

> ". . . to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them."

Moreover, it is difficult to imagine how the voting problem may be alleviated by an abridgment of talk and comment regarding its solution. This problem is important not only to an individual or some isolated group or to individual litigants in a particular lawsuit, but affects the entire Nation. When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion. Consistent suppression of discussion likely to affect pending investigations would mean that some continuing public grievances could never be discussed at all, or at least not at the moment when public discussion is most needed. The conviction here produces its "restrictive results at the precise time when public interest in the matters discussed would naturally be at its height," and "[n]o suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression."

Bridges v. *California, supra,* at 268, 269. Thus, in the absence of any showing of an actual interference with the undertakings of the grand jury, this record lacks persuasion in illustrating the serious degree of harm to the administration of law necessary to justify exercise of the contempt power. Compare *Craig* v. *Harney,* 331 U. S. 367, 376, 378; *Pennekamp* v. *Florida,* 328 U. S. 331, 349–350.

Finally, we are told by the respondent that, because the petitioner is sheriff of Bibb County and thereby owes a special duty and responsibility to the court and its judges, his right to freedom of expression must be more severely curtailed than that of an average citizen. Under the circumstances of this case, this argument must be rejected.

First, although we do not rely on the point exclusively, we noted at the outset of this opinion that there was no finding by the trial court that the petitioner issued the statements in his capacity as sheriff; in fact, the only evidence in the record on this point is the petitioner's allegation in his response, accepted as evidence by the trial court and uncontroverted by the respondent, that the statements were distributed by petitioner as a private citizen. Nowhere in the record, including the contempt citation as twice amended, can we find one word indicating that the prosecution relied on the fact that petitioner was sheriff to show a more substantial likelihood that his conduct would disrupt the administration of justice.[19] The opin-

[19] The amended citation, in relevant part, alleged:

"The Respondent, James I. Wood, Sheriff of Bibb County, is a full-time employee of the County of Bibb and is paid a salary for his services as such officer. Respondent is an officer of the Bibb Superior Court."

There is no allegation that *because* he was sheriff his conduct was more likely to cause a substantive evil than would the same conduct by a private citizen.

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ion of the Court of Appeals does not articulate any specific reliance on this fact,[20] and responses to our inquiries on this subject during oral argument were not illuminating. Moreover, the two counts before us were based on out-of-court publications which the petitioner signed without reference to his official capacity. Only in the letter sent directly to the grand jury room did the petitioner indicate in the statement that he was sheriff, and the Court of Appeals held that this statement did not present a clear and present danger to the administration of the law. In the light of this finding it is difficult to understand how the fact that the petitioner was sheriff of the county can be considered significant as to his news releases.

However, assuming that the Court of Appeals did consider to be significant the fact that petitioner was a sheriff, we do not believe this fact provides any basis for curtailing his right of free speech. There is no evidence that the publications interfered with the performance of his duties as sheriff or with his duties, if any he had, in connection with the grand jury's investigation. We are not dealing with a situation where a sheriff refuses to issue summonses or to maintain order in the court building; nor, so far as the record shows, did the petitioner do any act which might present a substantive harm to the jury's solution of the problem placed before it. We are dealing here only with public expression.

The petitioner was an elected official and had the right to enter the field of political controversy, particularly

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[20] The decision of the Court of Appeals, affirming the overruling of petitioner's demurrer to the effect that the allegation quoted in note 19 was irrelevant and should be stricken, is of no weight in light of the trial court's failure to make a finding of fact either that the statements were issued in petitioner's official capacity or that the fact he was sheriff was relevant.

where his political life was at stake.[21] Cf. *In re Sawyer*, 360 U. S. 622. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.

Our examination of the content of petitioner's statements and the circumstances under which they were published leads us to conclude that they did not present a danger to the administration of justice that should vitiate his freedom to express his opinions in the manner chosen.

The judgment is reversed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

Whether or not the clear and present danger doctrine of *Bridges* v. *California*, 314 U. S. 252, 260–263, 271, should be deemed to limit a state or federal court's use of the contempt power when employed against a member of its official entourage who has scandalized the conduct of the court in relation to and during the course of a pending judicial proceeding is a question which I need not reach in this case. For even under the most expansive view of *Bridges* and its offshoots the contempt judgment against this sheriff should be upheld.

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[21] Petitioner was not a civil servant, but an elected official, and hence this is not a case like *United Public Workers* v. *Mitchell*, 330 U. S. 75, in which this Court held that Congress has the power to circumscribe the political activities of federal employees in the career public service.

Over fifty years ago Mr. Justice Holmes wrote: "The theory of our [judicial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado,* 205 U. S. 454, 462. For this reason this Court has repeatedly held that a criminal conviction based on the verdict of jurors influenced by extrajudicial statements of the case cannot stand consistently with due process of law. *E. g., Irvin* v. *Dowd,* 366 U. S. 717. But invalidation of a proceeding so infected is not the only remedy available to combat interference with judicial processes; so to hold would confer a right to frustrate those processes with impunity. And so it is that this Court has uniformly upheld the power of courts to protect themselves by citations for contempt from improper influence upon proceedings before them. Sustaining this power against a claim of freedom of speech in *Patterson* v. *Colorado, supra,* 205 U. S., at 463, Mr. Justice Holmes wrote: "When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument or intimidation hardly can be denied." The right of free speech, strong though it be, is not absolute; when the right to speak conflicts with the right to an impartial judicial proceeding, an accommodation must be made to preserve the essence of both. Thus in *Bridges* v. *California, supra,* 314 U. S., at 271, the Court said:

> "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper. . . . We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to

what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment."

And again in *Pennekamp* v. *Florida,* 328 U. S. 331, 347: "Courts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action." See *Craig* v. *Harney,* 331 U. S. 367, 372–373.

The Court professes to recognize these principles. It holds nevertheless that the contempt sanction cannot be applied in this case, arguing both that "the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation," *ante,* p. 390, and that the findings of clear and present danger are unsupported by the record. I cannot agree with either proposition.

I.

The grand jury is an integral part of the judicial process, *Levine* v. *United States,* 362 U. S. 610, 617; *Gates* v. *State,* 73 Ga. App. 824, 826, 38 S. E. 2d 311, 312; contempt sanctions are available to protect its functions. *Levine* v. *United States, supra.* Congress has recognized the need for safeguarding the deliberations of federal grand juries by making it a crime to attempt to influence a federal grand juror by extrajudicial communication.[1] Even

[1] "Whoever attempts to influence the action or decision of any grand or petit juror of any court of the United States upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his duties, by writing or sending to him any written communication, in relation to such issue or matter, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

"Nothing in this section shall be construed to prohibit the communication of a request to appear before the grand jury." 18 U. S. C. § 1504.

assuming that a State may constitutionally permit a grand jury, unlike a petit jury, to be influenced by extrajudicial statements, a question explicitly left open in *Beck* v. *Washington*, 369 U. S. 541, 546, it certainly does not compel them to that course.

The Court does not dispute this. But, says the Court, no individual is on trial here; and "When the grand jury is performing its investigatory function into a general problem area, without specific regard to indicting a particular individual, society's interest is best served by a thorough and extensive investigation, and a greater degree of disinterestedness and impartiality is assured by allowing free expression of contrary opinion." *Ante*, p. 392. This, however, is surely a policy decision with respect to which a State may legitimately take a different view. The Court does not suggest that Georgia was attempting to use the mantle of judicial proceedings in order to insulate the transaction of nonjudicial business from criticism; investigation is a traditional function of the grand jury. I see no reason why the State cannot determine for itself what shall and what shall not be considered by grand jurors in conducting any of their traditional tasks. Moreover, it is not the fact that individual rights were not at stake in this proceeding. The judge charged the jury:

> "if there is sufficient evidence of unlawful acts, then all parties participating, white and colored, candidates or non-candidates, should be indicted by this Grand Jury so that the guilty parties, if there are any, may be brought to trial."

That petitioner's statements would tend to aid rather than to prejudice implicated individuals was equally true in *Bridges* v. *California, supra*, but was rightly afforded no significance; the State as well as the individual is entitled to a day in court.

It is not suggested that in declaring that grand jurors shall be protected from improper "outside" influence

Georgia has improperly departed from her own prior law. Nor could it well be maintained that the Georgia courts undertook to judge petitioner's conduct in terms of something other than the *Bridges* clear and present danger standard. The Georgia Court of Appeals held:

> "With respect to the question as to whether these acts of the defendant constituted a clear, present, or imminent danger or serious threat to the administration of justice, it is to be noted that the citation as amended so charges, the court below has by its conviction so found, and the evidence supports the finding." 103 Ga. App., at 321; 119 S. E. 2d, at 273.

To be sure this holding cannot preclude this Court from examining the evidence for itself. But this does not mean that it may do so with the same latitude as if it were sitting as a state court of review. The Court's functions are exhausted once it is determined that federal constitutional standards have been met. It is of course not incumbent on the state courts to deal in detail with the facts of this Court's earlier decisions in order to "display an awareness of the standards enunciated in those cases," or to make "elaborate findings" to demonstrate "*how* the publications interfered with the grand jury's investigation." *Ante*, pp. 386–387.

Accepting as I do for present purposes the *Bridges* test, this conviction must be upheld if the record supports the inference of clear and present danger.

II.

That test is amply met here. Petitioner, a public official connected with the court, accused, from his office in the courthouse, the Superior Court judges of fomenting race hatred; of misusing the criminal law to persecute and to intimidate political and racial minorities; of political naiveté, racial prejudice, and hypocrisy. He

compared the calling of the grand jury to the activities of the Ku Klux Klan. He made an undisguised effort to influence the outcome of the investigation by declaring that only the politically naive could believe Bibb County Negroes might be guilty of selling votes. It was stipulated that both of petitioner's formal statements were read by the grand jurors during the course of their investigation.

The Court considers this evidence insufficient because there was no showing of "an actual interference with the undertakings of the jury," that the jurors "felt unable or unwilling to complete their assigned task because petitioner 'interfered' with its completion," that "the investigation was not ultimately successful or, if it was not, that the petitioner's conduct was responsible for its failure." *Ante*, p. 387. Surely the Court cannot mean that attempts to influence judicial proceedings are punishable only if they are successful. Speech creating sufficient danger of an evil which the State may prevent may certainly be punished regardless of whether that evil materializes. See *Feiner* v. *New York*, 340 U. S. 315, 320–321. Indeed, the test suggested by the Court is even more stringent than that which it applies in determining whether a conviction should be set aside because of prejudicial "outside" statements reaching a trial jury. In such cases, although the question is whether the rights of the accused have been infringed rather than whether there has been a clear and present danger of their infringement, it is necessary only to show a substantial likelihood that the verdict was affected, and it is no answer that each juror expresses his belief that he remains able to be fair and impartial. *Irvin* v. *Dowd, supra*, 366 U. S., at 728; cf. *Marshall* v. *United States*, 360 U. S. 310, 312–313; *Spano* v. *New York*, 360 U. S. 315, 324. The test for punishing attempts to influence a grand or petit jury should be less rather than more stringent.

I cannot agree with the Court that petitioner's statements would have been likely to affect the outcome of the investigation "only if the charge was so manifestly unjust that it could not stand inspection." *Ante*, p. 391. This is to discredit the persuasiveness of argument, which the Court purports to value so highly. Any expression of opinion on the merits of a pending judicial proceeding is likely to have an impact on deliberations. In this instance that likelihood was increased by two factors which were not present in *Bridges*, *Pennekamp*, or *Craig*, in which the Court held the evidence insufficient to show clear and present danger. None of those cases involved statements by officers of the court; and all concerned statements whose alleged interference was with the deliberations of a judge rather than a jury. Georgia law requires the sheriff to execute and return court processes and orders and to preserve order during sessions of the courts. Ga. Code Ann., 1959, § 24–2813. Petitioner was thus a law-enforcement officer, whose office was in the very courthouse where the grand jury was sitting. Whether or not he issued the statements "in his capacity as sheriff," and whether or not the contempt citation alleged it, his words assumed an overtone of official quality and authority that lent them weight beyond those of an ordinary citizen.

Of equal if not greater importance is the fact that petitioner's statements were calculated to influence, not a judge chosen because of his independence, integrity, and courage and trained by experience and the discipline of law to deal only with evidence properly before him, but a grand jury of laymen chosen to serve for a limited term from the general population of Bibb County. It cannot be assumed with grand jurors, as it has been with judges, *Craig* v. *Harney*, *supra*, 331 U. S., at 376, that they are all "men of fortitude, able to thrive in a hardy climate." What may not seriously endanger the independent delib-

erations of a judge may well jeopardize those of a grand or petit jury. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 920 (opinion of FRANKFURTER, J.).

Moreover, the statements themselves were of such a nature as to distinguish this case from *Bridges, Pennekamp,* and *Craig.* It cannot be said here, as it was in *Bridges,* that petitioner's charges of racial bias, hypocrisy, political intimidation, persecution, and political naiveté, and his comparison of the judges with the Ku Klux Klan, "did no more than threaten future adverse criticism which was reasonably to be expected anyway," or that "if there was electricity in the atmosphere, it was generated by the facts; the charge added by the . . . [petitioner's statement] can be dismissed as negligible." 314 U. S., at 273, 278. The sheriff's remarks were not, as in *Pennekamp,* 328 U. S., at 348, general criticisms with respect to rulings already made, but specific attacks directed toward the disposition of the pending investigation. They cannot be characterized, as in *Craig,* 331 U. S., at 374–375, as merely unfair reports of the activities of others; unlike the editorial in that case, *id.*, at 376–377, petitioner's criticisms went squarely to the merits of the investigation and impugned as well the motives and honesty of those conducting it. I do not understand how it can be denied that a grand juror, reading in the course of this investigation the sheriff's statement that the judges who instructed the grand jury to undertake it were racial bigots making discriminatory use of the laws for purposes of political repression, and that the charges themselves were incredibly false, might well be influenced in his deliberations.

The petitioner's last formal statement, which he and the Court characterize as a "defense," was also properly found to constitute a contempt. Defenses, like charges, should be presented to a court judicially and not through the public press. But in fact the affirmance of petitioner's conviction was not based at all on the allegation

that this defense interfered with *his* trial for contempt. Rather, the Court of Appeals held that this further statement had been made "in an apparent effort to hamper the grand jury which was still considering the charges given it by the court." 103 Ga. App., at 321, 119 S. E. 2d, at 273. This conclusion, based on the repetition of a number of petitioner's previous statements and the allegation that they were true,[2] was clearly justified.

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[2] Petitioner's last statement was as follows:

"My defense will be simply that I have spoken the truth. Anyone who will read, point by point, my statements concerning the Judges' charge will find those statements true.

"The Judges were wrong to use 'Negro Bloc Voting', the campaign slogan of Talmadge, and similar phrases as language with which to instruct a Grand Jury. When I stated 'It is shocking to find a Judge charging a Grand Jury in the style and language of a race baiting candidate for political office' was it contempt of court or was I pointing out the truth?

"When I said 'If anyone in this community be free of racial prejudice, it should be our Judges' was this contempt of Court or was I stating a truth?

"The Judges were morally wrong to suddenly order a Grand Jury to single out the Negro political leaders for indictments under a forgotten law which even judges have violated. When I said 'It further seems that [*sic*] the height of hypocrisy to dust off an old blue law that has been ignored for fifty years and suddenly order its rigid enforcement against a minority group of voters' was this contempt of Court or was I speaking the truth?

"The Judges were professionally wrong in involving the Court in political affairs. I stated that the Judges' charges 'threaten political persecution carried out under the guise of law enforcement' and further that 'this action appears either as a crude attempt at judicial intimidation of Negro voters and leaders, or, at best, as agitation for a "Negro Vote" issues [*sic*] in local politics.' Can anyone read the Judges' instructions for indictments under the old 'influencing voters' law and honestly say no political persecution is threatened when almost all office holders have violated this law? Can anyone read the long charge reciting political rumors and charges against Negro leaders and voters and honestly say there is no appearance of any attempt at intimidation of Negro voters and leaders? Likewise can anyone deny

Finally, petitioner's case is not saved by the fact that both he and the judges he attacked are elected officials, or by the fact that the statement concerned an issue of some political moment. There was ample opportunity to bring the judges' performance to the voters after the investigation was closed. "Political interest" cannot be used as an excuse for affecting the result of a judicial inquiry.

I would affirm.

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such a charge and such an investigation in the midst of local political races agitates a 'Negro Vote' issue?

"If the Court will permit I believe that many thousands of witnesses would testify in my behalf that they drew the same conclusions as I from the language used by the Judges in their charge.

"Is it just, or even fair play, for the Judges to say they intended no threat, no intimidation, no agitation and therefore it is contempt of court to publicly state honest, sincere conclusions and practical effects caused by the language of the charge.

"Two wrongs do not make a right, and the Judges are wrong to cite me for contempt. I cannot view the Judges' action in any light except to believe I am to be prosecuted for daring to criticise the Judges and for speaking the truth.

"I had hoped that the entire ill-will and race agitation stirred up by the Judges' charge would be permitted to die after a face-saving presentment by the Courts' Grand Jury. To this end I remained silent despite grossly false and discrediting conclusions presented. Now it appears that the Judges want the satisfaction of find [*sic*] me in contempt of court, but if they so do, they are in effect saying that the court has done no wrong because the court itself finds it has done no wrong.

"/s/ James I. Wood"

UNITED STATES *v.* WISE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

No. 488. Argued April 16, 1962.—Decided June 25, 1962.

A grand jury indicted appellee and a corporation of which he was an officer for engaging in a combination and conspiracy to eliminate price competition in the sale of milk in the Kansas City area, in violation of § 1 of the Sherman Act. In a bill of particulars, the Government charged that appellee had been acting "solely in his capacity as an officer, director, or agent who authorized, ordered, or did" some of the acts constituting a violation. The District Court dismissed the indictment as to appellee, on the ground that § 1 of the Sherman Act does not apply to corporate officers acting in a representative capacity. *Held:* A corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting an illegal contract, combination or conspiracy—be he one who authorizes, orders or helps to perpetrate the crime—regardless of whether he is acting in a representative capacity. Pp. 406–416.

(a) An officer of a corporation acting solely in his representative capacity is a "person" within the meaning of § 1 of the Sherman Act, which imposes criminal sanctions upon "every person" who violates its provisions. Pp. 407–408.

(b) A different conclusion is not required by § 8, which defines "person" to include "corporations and associations." Pp. 408–411.

(c) A different conclusion is not required by § 14 of the Clayton Act or its legislative history. Pp. 411–415.

(d) Nothing in the language or legislative history of the 1955 amendment to the Sherman Act, increasing the penalty for violation thereof from $5,000 to $50,000 without making a corresponding increase in the $5,000 penalty under the Clayton Act, indicates that Congress intended to restrict the applicability of the increased fine to corporations. P. 415.

196 F. Supp. 155, reversed.

Robert L. Wright argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger, Daniel M. Friedman* and *Richard A. Solomon.*

John T. Chadwell argued the cause for appellee. With him on the briefs were *Richard W. McLaren, James A. Rahl, James E. Hastings, Martin J. Purcell* and *John H. Lashly.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

A grand jury returned an indictment charging the National Dairy Products Corporation with engaging "in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of . . . trade and commerce, in violation of Section 1" of the Sherman Act, 15 U. S. C. § 1. Two counts incorporated by reference the alleged illegal acts of the corporation and named the appellee as codefendant. In a bill of particulars the Government charged that the appellee had "been acting solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts" constituting the violation. The appellee moved for a dismissal on the ground that the indictment, as particularized by the bill, failed to charge a crime. According to appellee, the Sherman Act does not apply to corporate officers acting in a representative capacity; he contends that the statute exclusively applicable to these officers is § 14 of the Clayton Act, 15 U. S. C. § 24. Over the Government's opposition the dismissal was ordered by the district judge. 196 F. Supp. 155. An appeal was perfected pursuant to 18 U. S. C. § 3731, and we noted probable jurisdiction. 368 U. S. 945.

Although the Sherman Act has been in existence for over 70 years and although corporate officers have been indicted under that Act for almost as long, see, *e. g., United States* v. *Greenhut,* 50 F. 469 (D. C. D. Mass. 1892); *United States* v. *Patterson,* 55 F. 605 (D. C. D.

Mass. 1893),[1] this question is one of first impression for this Court. The impetus for raising this issue at such a late date comes from the fact that in 1955 the Congress raised the penalty provision in the Sherman Act from $5,000 to $50,000 without making a corresponding increase in the $5,000 penalty found in the Clayton Act.

Section 1 of the Sherman Act imposes criminal sanctions upon "every person" who violates that provision, 15 U. S. C. § 1.[2] The Government contends that a corporate officer is obviously a "person" within the Act. The appellee, however, distinguishes between a corporate officer who represents his corporation and one who acts on his own account. In the latter case the appellee agrees that the Sherman Act applies. But, when the officer is acting solely for his corporation, the appellee contends that he is no longer a "person" within the Act. The rationale for this distinction is that the activities of an officer, however illegal and culpable, are chargeable to the corporation as the principal but not to the individual who perpetrates them.

No substantial support for such an artificial interpretation of a seemingly clear statute is provided by the legislative history. The most that can be said for the appellee's position is that the Reagan Bill, an unsuccessful competitor of the Sherman Bill, specifically included corporate

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[1] In the Government's brief the Solicitor General cites 40 cases in which corporate officers were indicted under the Sherman Act between 1890 and 1914. Brief for Appellant, pp. 69–72.

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared . . . to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

officers in its penal section while the Sherman Bill had no penal section at one time. The penal provision of the Reagan Bill was offered as an amendment to the Sherman Bill, and the Senate Committee on the Judiciary then redrafted and resubmitted a bill in the form which became the Sherman Act. 21 Cong. Rec. 2731, 3152. That Act outlawed certain acts by "persons," and there is nothing to indicate that the Congress intended to restrict the meaning as applied to corporate officers. See *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 61.

The appellee points to § 8 of the Sherman Act, 15 U. S. C. § 7, which defines "person" "to include corporations and associations." He argues that, since corporations are included within the term, individual corporate officers are thereby excluded. This is a *non sequitur.* The mere fact that the term is given a broad construction does not alter its basic meaning, and no such inference can be drawn from the express inclusion of corporations as "persons." The reason for this inclusion is readily understandable. The doctrine of corporate criminal responsibility for the acts of the officers was not well established in 1890. See *New York Central & H. R. R. Co.* v. *United States,* 212 U. S. 481. When a criminal statute proscribed conduct by "persons," corporate defendants contended that only natural persons were included. *United States* v. *Amedy,* 11 Wheat. 392. The same issue raised in other cases was not always resolved by a unanimous Court. *Beaston* v. *Farmers' Bank of Delaware,* 12 Pet. 102. Cf. *United States* v. *Shirey,* 359 U. S. 255. The dissent by Mr. Justice Story in the *Beaston* case would be sufficient reason for a careful draftsman to avoid the whole problem of a provision such as § 8. Further reason for caution lay in the language found in cases then recent, *Sinking-Fund Cases,* 99 U. S. 700, 718–719, and *Canada Southern R. Co.* v. *Gebhard,* 109 U. S. 527, 542 (dissenting opinion), which distinguished between per-

sons and corporations when considering the application of the Fourteenth Amendment's protection to "persons." See *Philadelphia Fire Assn.* v. *New York,* 119 U. S. 110, 120 (dissenting opinion). Therefore, we attribute no significance to the specific inclusion of corporations in the definition of "persons" in determining whether a corporate officer is within the term.

This Court was faced with the same problem in *United States* v. *Dotterweich,* 320 U. S. 277, involving the construction of the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. §§ 301–392. An earlier version of the Act stated that the acts of a corporate officer would be chargeable both to him and to the corporation. In a 1938 revision the statute made any "person" responsible and specifically included corporations within that term. 52 Stat. 1040. The Court of Appeals reversed the conviction of a corporate officer on the ground that only a corporation was a "person" within the Act. This Court reversed the Court of Appeals, rejecting substantially the same argument that is advanced by the appellee in this case. The reason for the rejection is equally applicable to the case at bar. No intent to exculpate a corporate officer who violates the law is to be imputed to Congress without clear compulsion; else the fines established by the Sherman Act to deter crime become mere license fees for illegitimate corporate business operations. Following *Dotterweich,* we construe § 1 of the Sherman Act in its common-sense meaning to apply to all officers who have a responsible share in the proscribed transaction. Cf. *Carolene Products Co.* v. *United States,* 323 U. S. 18, 21.

This construction is supported by the decisions of the lower federal courts which considered the problem of whether corporate officers were "persons" within the Sherman Act in the interim before the passage of the Clayton Act. The most significant case is *United States* v. *MacAndrews & Forbes Co.,* 149 F. 823 (C. C. S. D. N. Y.

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1906), in which the Court considered the joint indictment of a corporation and some of its officers for violations of the Sherman Act. The defendants demurred to the joinder, the corporation pleading that only the human agents could be held responsible for the misdemeanor while the officers pleaded that only the corporation was responsible. The Court refused to hold as a matter of law that either proposition was correct because responsibility was, in each case, a matter of fact. The Court noted that the officers may or may not be convicted, depending upon whether they were personally responsible for the crime.[3]

In *United States* v. *Winslow,* 195 F. 578 (D. C. D. Mass. 1912), the same contention by corporate officers was given short disposition:

> "The indictment, however, expressly charges them [the corporate officers] as actors, and two fundamental principles are thoroughly settled. One is that neither in the civil nor the criminal law can an officer protect himself behind a corporation where he is the actual, present, and efficient actor; and the second is that all parties active in promoting a misdemeanor, whether agents or not, are principals." 195 F., at 581.

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[3] "It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors. When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemanors [*sic*], and further declares that the word 'person' as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. . . . I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment." 149 F., at 832.

We have found no case between 1890 and 1914 in which a corporate officer successfully secured the dismissal of an indictment or the reversal of a conviction on the ground that he was not a "person" within the Sherman Act when he acted solely as a representative of the corporation.

Unless subsequent statutes have repealed or amended this aspect of the Sherman Act, our inquiry is at an end.

The appellee seeks succor in the subsequent legislative history accompanying attempts to amend the Sherman Act between 1890 and 1914. He particularly relies upon H. R. 10539, 56th Cong., 1st Sess. (1900). This bill would have expressly included corporate officers and agents in the definition of "persons" found in § 8. The report accompanying that bill stated that the existing law did not subject agents, officers, and attorneys to penalties. H. R. Rep. No. 1506, 56th Cong., 1st Sess. However, statutes are construed by the courts with reference to the circumstances existing at the time of the passage. The interpretation placed upon an existing statute by a subsequent group of Congressmen who are promoting legislation and who are unsuccessful has no persuasive significance here. *United States* v. *Price,* 361 U. S. 304, 313; *United States* v. *Turley,* 352 U. S. 407, 415, n. 14; *Fogarty* v. *United States,* 340 U. S. 8, 13–14; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 47; *United States* v. *United Mine Workers,* 330 U. S. 258, 281–282; *Gemsco, Inc.,* v. *Walling,* 324 U. S. 244, 265. Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change.

In 1914 the Congress passed "An Act To supplement existing laws against unlawful restraints and monopolies,

and for other purposes," commonly called the Clayton Act. Section 14 of that Act provided:

> "That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." 38 Stat. 736.

The appellee contends that § 14 is an entirely new provision added by Congress to provide for the criminal reponsibility of corporate officers who act in a representative capacity. The Government contends that § 14 is merely supplemental and that appellee's construction results in an implied repeal of part of § 1 of the Sherman Act.[4]

Appellee asserts that § 14 would not literally apply to the officer who acted on his own account because his misconduct would not be attributed to the corporation. From this premise he argues that since § 14 of the Clayton Act applies only to an officer acting in a representative capacity, § 1 of the Sherman Act only applies to an officer acting on his own account.

We do not agree. The reasons for § 14 are sufficiently revealed by the legislative history. The provision origi-

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[4] Appellee also argues, "[t]he Government in this case has not expressly relied on an aider and abettor theory, but . . . it has sought tacit support from the theory." Brief for Appellee, pp. 62–68. Under the view we take of the case, it is unnecessary to consider the application of the general aider and abettor statute, 18 U. S. C. § 2.

nated in the House, and, after conferences with the Senate, survived substantially intact. The reports provide no assistance, but the debates do. Whether any *supplementary* legislation was necessary was the essence of the debates. As Senator Shields, an opponent, said, "[§ 14] is merely a reenactment of the Sherman law, sections 1, 2, and 3. In other words, it has always been held that the officers of corporations violating the law were punishable under these sections . . . ." 51 Cong. Rec. 14214. See 51 Cong. Rec. 9079, 9080, 9169, 9201, 9202, 9595, 9610, 14225, 15820, 16143. The proponents of the bill agreed that the Sherman Act did cover officers whose conduct constituted the offense (without distinction as to the capacity in which the officer was acting), but were disappointed in the sympathy shown to corporate officers by judges, juries, and prosecutors. Second, the proponents feared that the present Sherman Act did not cover officers who merely authorized or ordered the commission of the offense. These ideas were clearly expressed by Representative Floyd, a House manager:

> "The purpose we had was to make it clear that, when a corporation had been guilty, those officers, agents, and directors of the corporation that either authorized, ordered, or did the thing prohibited should be guilty. Under the existing law, and without that provision of the statute, the person who did the things would undoubtedly be guilty; but in the enforcement of the criminal provisions of the Sherman law, experience has demonstrated that both juries and courts are slow to convict men who have simply done acts authorized or ordered by some officers of the concern higher up, and the words 'authorized' and 'ordered' were introduced to reach the real offenders, the men who caused the things to be done . . . ." 51 Cong. Rec. 9609. See 51 Cong. Rec. 9074, 9185, 9676, 9677, 9678, 9679, 16317.

Third, the proponents were fearful that the Sherman Act might not cover the activities of an officer which made a single "link" in the "chain" of events constituting the antitrust violation. Hence, the provision fixing responsibility for an act constituting "in whole or in part" the violations. 51 Cong. Rec. 9679, 16275, 16317.

We examine this legislative history in order to ascertain the intent of Congress as to the ultimate purpose of § 14 of the Clayton Act. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 591–592; *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 390–395; *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 43–46, 49; *Corn Products Refining Co.* v. *Federal Trade Comm'n*, 324 U. S. 726, 734–737. How members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act. *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84; *Rainwater* v. *United States*, 356 U. S. 590; *Koshkonong* v. *Burton*, 104 U. S. 668; *Ogden* v. *Blackledge*, 2 Cranch 272, 277. See *United States* v. *Stafoff*, 260 U. S. 477; *Penn Mutual Life Ins. Co.* v. *Lederer*, 252 U. S. 523; *Levindale Lead & Zinc Mining Co.* v. *Coleman*, 241 U. S. 432; *Talbot* v. *Seeman*, 1 Cranch 1, 35. But see *Sioux Tribe* v. *United States*, 316 U. S. 317; *Stockdale* v. *Insurance Co.*, 20 Wall. 323, 331 (separate opinion); *United States* v. *Freeman*, 3 How. 556. Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586.

Section 14 was intended to be a reaffirmation of the Sherman Act's basic penal provisions and a mandate to prosecutors to bring all responsible persons to justice. In the light of the congressional purpose revealed on the face of the statute and by the legislative history, this Court cannot construe § 14 as a restriction of § 1 of the Sherman Act. Thus, insofar as § 14 relates to the corporate officer who participates in the Sherman Act violation, whether or not in a representative capacity, no change was either intended or effected.

The cases subsequent to the Clayton Act reveal an understanding in accord with our own. The Government continued to seek indictments of corporate officers under the Sherman Act, not the Clayton Act, and many convictions were obtained. See, *e. g.*, *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *American Tobacco Co.* v. *United States*, 147 F. 2d 93 (C. A. 6th Cir.), affirmed, 328 U. S. 781.

The appellee does not call to our attention any case during this time in which the contention he now makes was successfully urged. He suggests that the dearth of cases on this point reflects the belief on the part of corporate officers that, because of the identical penalties of the Clayton Act, the successful challenge to a Sherman Act indictment would be an academic victory. We cannot even attempt to evaluate the motives of individual defendants in raising or not raising defenses, even if we regarded the matter as being significant, which we do not.

The Government, on the other hand, relies upon *United States* v. *Atlantic Comm'n Co.*, 45 F. Supp. 187 (D. C. E. D. N. C.); *United States* v. *General Motors Corp.*, 26 F. Supp. 353 (D. C. N. D. Ind.), affirmed, 121 F. 2d 376 (C. A. 7th Cir.); and *United States* v. *National Malleable & Steel Castings Co.*, 6 F. 2d 40 (D. C. N. D. Ohio), holding that nothing in § 14 of the Clayton Act altered the existing liability for prosecution of all officers who participate in the violation of the Sherman Act. With this, we agree.

We also agree that there is nothing in the 1955 amendment to the Sherman Act nor in its legislative history to indicate that the Congress intended to restrict the applicability of the increased fine to corporations. See 69 Stat. 282; S. Rep. No. 618, 84th Cong., 1st Sess.; H. R. Rep. No. 70, 84th Cong., 1st Sess.

Based upon the foregoing, we hold that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who authorizes, orders, or helps perpetrate the crime—regardless of whether he is acting in a representative capacity. It follows that the District Court erred when it dismissed the indictment against the appellee. The case is reversed and remanded for proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE HARLAN, concurring.

I join in the opinion of THE CHIEF JUSTICE with some additional observations, believed warranted by the circumstance that the holding below has since been followed by five District Courts, with only two others to the contrary.[1]

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[1] The opinion below is reported at 196 F. Supp. 155 (W. D. Mo. 1961). In accord are *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582 (D. D. C. 1961), appeal pending, No. 1019, O. T. 1961; *United States* v. *Milk Distributors Assn.*, 200 F. Supp. 792 (D. Md. 1961); *United States* v. *American Optical Co.*, 1961 Trade Cases, par. 70,156 (E. D. Wis. 1961), reversed *sub nom. United States* v. *Kniss, post,* p. 719; *United States* v. *General Motors Corp.*, 1962 Trade Cases, par. 70,203 (S. D. Cal. 1962), reversed *sub nom. United States* v. *Staley, post,* p. 719; and *United States* v. *Engelhard-Hanovia, Inc.*, 204 F. Supp. 407 (S. D. N. Y. 1962), appeal pending *sub nom. United States* v. *Brown,* No. 983, O. T. 1961.

In *United States* v. *North American Van Lines, Inc.*, 202 F. Supp. 639 (D. D. C. 1962), the court refused to dismiss an indictment of corporate officers, holding that they were not charged with acting solely in a representative capacity. It went on to say that in any

The language of § 1 of the Sherman Act, providing a penalty for "every person" who engages in a conspiracy or makes a contract in restraint of trade, of course presents a serious obstacle to appellee's contention that he cannot be prosecuted thereunder. I agree with the Court that § 8, defining "person" to include corporations and associations, does not imply the exclusion of natural persons. Moreover, the fiction of corporate entity, operative to protect officers from contract liability, had never been applied as a shield against criminal prosecutions when the Sherman Act was passed. In fact I think there can have been no serious doubt even as early as 1890 that officers could be punished for crimes committed for their corporations. Until well into the nineteenth century the corporation itself could not be convicted; the individuals who acted in its name of course could be. See the anonymous note of Holt, C. J., 12 Mod. 559, Case 935, 88 Eng. Rep. 1518 (K. B. 1701); *Rex* v. *Medley,* 6 Car. & P. 292, 297, 299, 172 Eng. Rep. 1246, 1249–1250 (K. B. 1834); *State* v. *Great Works Milling & Mfg. Co.,* 20 Me. 41, 44 (1841); Ballantine, Corporations (rev. ed. 1946), § 113. However, it was recognized that corporate officers could be convicted for "representative" crimes even after the corporation's immunity was worn away, *Regina* v. *Great North of England R. Co.,* [1846] 9 Q. B. 315, 325–327, 115 Eng. Rep. 1294, 1298; *State* v. *Morris & E. R. Co.,* 23 N. J. L. 360, 369 (1852); *State* v. *Patton,* 26 N. C. 16 (1843), in line with the rule stated in 1 Bishop, Criminal Law (7th ed. 1882), § 892, that an agent might be punished for crimes committed for his principal. Cf. *United*

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event the Sherman Act applied to representative acts. We are informed by the parties here that in *United States* v. *Packard-Bell Electronics Corp.,* Cr. No. 30158, S. D. Cal., a motion to dismiss was denied without opinion. The indictment, see 5 CCH Trade Reg. Rep. (1961), par. 45,061, case 1632, charged violations of § 14 as well as of § 1.

States v. *Mills*, 7 Pet. 138, 142. A substantial volume of convictions of individuals for corporate crimes had accumulated by 1890.[2] Congress legislated against this background; it used words sufficiently broad that representative crimes fell within their ordinary meaning; and the normal inference would be that Congress intended to punish those responsible for acts which it declared unlawful.

The legislative history discloses no intention on the part of Congress to exempt the representative offenses of corporate officers. The Sherman bill, S. 1, 50th Cong., 1st Sess., was reported to the Senate with criminal penalties expressly extending to corporate officers and agents, but Senator Sherman soon omitted the criminal provisions altogether. 21 Cong. Rec. 1765, 2455. Senator Reagan then offered a substitute bill which, among other things, reinstated the criminal provisions, again expressly naming corporate agents in slightly different language. *Id.*, at 2456. Appellee relies on statements made by Senator Sherman in the debate:

> "Whether this law should extend to mere clerks, as was proposed in the third section [as reported by the Committee], is a matter of grave doubt. . . . To restrain and prevent the illegal tendency of a corporation is the proper duty of a court of equity. To punish the criminal intention of an officer is a much

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[2] *Moore* v. *State*, 48 Miss. 147 (1873); *Elsberry* v. *State*, 52 Ala. 8, 10 (1875); *Ex parte Schmidt*, 2 Tex. App. 196 (1877); *Cowley* v. *People*, 83 N. Y. 464, 469 (1881); *State* v. *Parsons*, 12 Mo. App. 205 (1882); *City of Wyandotte* v. *Corrigan*, 35 Kan. 21, 26, 10 P. 99, 102 (1886). The only decision found to the contrary is *Commonwealth* v. *Demuth*, 12 S. & R. 389, 392 (Pa. 1825), in which a particular statute was read not to impose a duty on individual officers. That this did not state a general rule even in Pennsylvania was made clear by the Supreme Court of that State in *Commonwealth* v. *Ohio & P. R. Co.*, 1 Grant 329, 350 (1856) (dictum).

more difficult process and might be well left to the future. . . . These corporations do not care about your criminal statutes aimed at their servants. . . ." *Id.*, at 2456, 2457, 2569.

However, the issue before the Senate at that time was not whether to exempt corporate officers from criminal prosecution but whether to omit criminal sanctions *entirely*. The objections raised—that the addition of criminal penalties would result in strict construction in favor of legality and would inflict punishment for violations of vague and uncertain provisions—applied as well to persons acting for their own account, admittedly included within the Act as passed, as to those acting for corporations. Moreover, Senator Sherman was promptly overruled by a vote of 34–12, adopting the Reagan amendment as an amendment to the Sherman bill. *Id.*, at 2611. A number of additional amendments rendered the bill quite unwieldy, see *id.*, at 2655 (Senator Sherman), and it was submitted to the Committee on the Judiciary for tailoring, *id.*, at 2731. The bill was redrafted in committee to its approximate present form and passed by a 52-1 vote, *id.*, at 2901, 3145, 3153.

I am not persuaded, as argued by the appellee, that the greater margin of support for the final bill than for the Reagan bill indicates that the criminal liability of corporate officers was narrowed. Opposition to the Reagan bill was based in part on its specification of unlawful purposes that would render a combination a trust, *id.*, at 2469 (Senator Reagan), 2561 (Senator Teller), which was omitted by the Committee, and in part on the inclusion of any criminal penalties at all, a feature common to the Reagan and the final bills which was accepted at the end in a spirit of compromise, as it was by Senator Sherman himself, *id.*, at 2604, 2655. No Senator ever suggested, so far as can be found, that criminal penalties should be provided for corporations and for self-employed or "ultra

vires" individuals alone. Thirty-four Senators—a majority of the whole body—voted to include, via the Reagan bill, sanctions against officers acting for the corporation. The Committee's reduction of the explicit, but cumbersome, language of the Reagan bill to the simple and on its face equally all-encompassing "every person" appears to have been simply a part of the general streamlining of the bill that took place in the Committee, with no intention of changing substance.

These and the further considerations dealt with in the opinion of THE CHIEF JUSTICE [3] lead to the conclusion that the indictment in this case must be sustained.

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[3] I find little support, however, for our conclusion in *United States* v. *MacAndrews & Forbes Co.*, 149 F. 823 (C. C. S. D. N. Y. 1906), or *United States* v. *Winslow*, 195 F. 578 (D. Mass. 1912), despite some of the language in those opinions. Neither case squarely upholds criminal responsibility in a "representative" capacity. Among other things the court in *MacAndrews & Forbes* declared it possible to infer from the indictment that the corporations were "doing one thing and the individuals another at or about the same time, which things were utterly different . . . . It is conceivable that the evidence may show that the individual defendants were not free agents, but acted under a species of corporate coercion, for which they should not be held personally responsible; but it is impossible to arrive at this conclusion on demurrer." 149 F., at 832. In *Winslow*, the indictment charged the officers with controlling the industry "by the device and means of and through and in the names of" certain corporations. 195 F., at 591. Thus all that was held in *MacAndrews & Forbes*, and all that needed to be held in *Winslow*, was that corporate officers are not shielded from criminal responsibility when they act on their own individual account or when they use a sham corporation as a means of furthering their personal ends.

Nor do I find much weight in the decisions since 1914 upholding the applicability of the Sherman Act to representative crimes of corporate officers; while the penalties for violating the two statutes were identical there was little incentive to argue to the contrary. The most that can be said of the decisions since 1890 is that they have suggested no doubt of the applicability of the Sherman Act to corporate officers acting only in a representative capacity.

ENGEL ET AL. *v.* VITALE ET AL.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 468. Argued April 3, 1962.—Decided June 25, 1962.

Because of the prohibition of the First Amendment against the enactment of any law "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State at the beginning of each school day—even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited. Pp. 422–436.

10 N. Y. 2d 174, 176 N. E. 2d 579, reversed.

William J. Butler argued the cause for petitioners. With him on the briefs was *Stanley Geller.*

Bertram B. Daiker argued the cause for respondents. With him on the briefs was *Wilford E. Neier.*

Porter R. Chandler argued the cause for intervenors-respondents. With him on the briefs were *Thomas J. Ford* and *Richard E. Nolan.*

Charles A. Brind filed a brief for the Board of Regents of the University of the State of New York, as *amicus curiae,* in opposition to the petition for certiorari.

Briefs of *amici curiae,* urging reversal, were filed by *Herbert A. Wolff, Leo Rosen* and *Nancy Wechsler* for the American Ethical Union; *Louis Caplan, Edwin J. Lukas, Paul Hartman, Theodore Leskes* and *Sol Rabkin* for the American Jewish Committee et al.; and *Leo Pfeffer, Lewis H. Weinstein, Albert Wald, Shad Polier* and *Samuel Lawrence Brennglass* for the Synagogue Council of America et al.

A brief of *amici curiae,* urging affirmance, was filed by *Roger D. Foley,* Attorney General of Nevada, *Robert*

Pickrell, Attorney General of Arizona, *Frank Holt,* Attorney General of Arkansas, *Albert L. Coles,* Attorney General of Connecticut, *Richard W. Ervin,* Attorney General of Florida, *Eugene Cook,* Attorney General of Georgia, *Frank Benson,* Attorney General of Idaho, *Edwin K. Steers,* Attorney General of Indiana, *William M. Ferguson,* Attorney General of Kansas, *Jack P. F. Gremillion,* Attorney General of Louisiana, *Thomas B. Finan,* Attorney General of Maryland, *Joe T. Patterson,* Attorney General of Mississippi, *William Maynard,* Attorney General of New Hampshire, *Arthur J. Sills,* Attorney General of New Jersey, *Earl E. Hartley,* Attorney General of New Mexico, *Leslie R. Burgum,* Attorney General of North Dakota, *David Stahl,* Attorney General of Pennsylvania, *J. Joseph Nugent,* Attorney General of Rhode Island, *Daniel R. McLeod,* Attorney General of South Carolina, *A. C. Miller,* Attorney General of South Dakota, *Will Wilson,* Attorney General of Texas, and *C. Donald Robertson,* Attorney General of West Virginia.

Mr. Justice Black delivered the opinion of the Court.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and

legislative powers over the State's public school system.[1] These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that "Congress shall make no law respecting an establishment of religion"—a command which was "made applicable to the State of New York by the Fourteenth Amendment of the said Constitution." The New York Court of Appeals, over the dissents of Judges Dye and Fuld, sustained an order of the lower state courts which had upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection.[2]

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[1] See New York Constitution, Art. V, § 4; New York Education Law, §§ 101, 120 *et seq.*, 202, 214–219, 224, 245 *et seq.*, 704, and 801 *et seq.*

[2] 10 N. Y. 2d 174, 176 N. E. 2d 579. The trial court's opinion, which is reported at 18 Misc. 2d 659, 191 N. Y. S. 2d 453, had made it clear that the Board of Education must set up some sort

We granted certiorari to review this important decision involving rights protected by the First and Fourteenth Amendments.[3]

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been

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of procedures to protect those who objected to reciting the prayer: "This is not to say that the rights accorded petitioners and their children under the 'free exercise' clause do not mandate safeguards against such embarrassments and pressures. It is enough on this score, however, that regulations, such as were adopted by New York City's Board of Education in connection with its released time program, be adopted, making clear that neither teachers nor any other school authority may comment on participation or nonparticipation in the exercise nor suggest or require that any posture or language be used or dress be worn or be not used or not worn. Nonparticipation may take the form either of remaining silent during the exercise, or if the parent or child so desires, of being excused entirely from the exercise. Such regulations must also make provision for those nonparticipants who are to be excused from the prayer exercise. The exact provision to be made is a matter for decision by the board, rather than the court, within the framework of constitutional requirements. Within that framework would fall a provision that prayer participants proceed to a common assembly while nonparticipants attend other rooms, or that nonparticipants be permitted to arrive at school a few minutes late or to attend separate opening exercises, or any other method which treats with equality both participants and nonparticipants." 18 Misc. 2d, at 696, 191 N. Y. S. 2d, at 492–493. See also the opinion of the Appellate Division affirming that of the trial court, reported at 11 App. Div. 2d 340, 206 N. Y. S. 2d 183.

[3] 368 U. S. 924.

religious, none of the respondents has denied this and the trial court expressly so found:

> "The religious nature of prayer was recognized by Jefferson and has been concurred in by theological writers, the United States Supreme Court and State courts and administrative officials, including New York's Commissioner of Education. A committee of the New York Legislature has agreed.
>
> "The Board of Regents as *amicus curiae,* the respondents and intervenors all concede the religious nature of prayer, but seek to distinguish this prayer because it is based on our spiritual heritage. . . ." [4]

The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer,

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[4] 18 Misc. 2d, at 671–672, 191 N. Y. S. 2d, at 468–469.

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which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549,[5] set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England.[6] The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time.[7] Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and

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[5] 2 & 3 Edward VI, c. 1, entitled "An Act for Uniformity of Service and Administration of the Sacraments throughout the Realm"; 3 & 4 Edward VI, c. 10, entitled "An Act for the abolishing and putting away of divers Books and Images."

[6] The provisions of the various versions of the Book of Common Prayer are set out in broad outline in the Encyclopaedia Britannica, Vol. 18 (1957 ed.), pp. 420–423. For a more complete description, see Pullan, The History of the Book of Common Prayer (1900).

[7] The first major revision of the Book of Common Prayer was made in 1552 during the reign of Edward VI. 5 & 6 Edward VI, c. 1. In 1553, Edward VI died and was succeeded by Mary who abolished the Book of Common Prayer entirely. 1 Mary, c. 2. But upon the accession of Elizabeth in 1558, the Book was restored with important alterations from the form it had been given by Edward VI. 1 Elizabeth, c. 2. The resentment to this amended form of the Book was kept firmly under control during the reign of Elizabeth but, upon her death in 1603, a petition signed by more than 1,000 Puritan ministers was presented to King James I asking for further alterations in the Book. Some alterations were made and the Book retained substantially this form until it was completely suppressed again in 1645 as a result of the successful Puritan Revolution. Shortly after the restoration in 1660 of Charles II, the Book was again reintroduced, 13 & 14 Charles II, c. 4, and again with alterations. Rather than accept this form of the Book some 2,000 Puritan ministers vacated their benefices. See generally Pullan, The History of the Book of Common Prayer (1900), pp. vii–xvi; Encyclopaedia Britannica (1957 ed.), Vol. 18, pp. 421–422.

obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs.[8] Other groups, lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies.[9] Indeed, as late as the time of the Revolu-

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[8] For example, the Puritans twice attempted to modify the Book of Common Prayer and once attempted to destroy it. The story of their struggle to modify the Book in the reign of Charles I is vividly summarized in Pullan, History of the Book of Common Prayer, at p. xiii: "The King actively supported those members of the Church of England who were anxious to vindicate its Catholic character and maintain the ceremonial which Elizabeth had approved. Laud, Archbishop of Canterbury, was the leader of this school. Equally resolute in his opposition to the distinctive tenets of Rome and of Geneva, he enjoyed the hatred of both Jesuit and Calvinist. He helped the Scottish bishops, who had made large concessions to the uncouth habits of Presbyterian worship, to draw up a Book of Common Prayer for Scotland. It contained a Communion Office resembling that of the book of 1549. It came into use in 1637, and met with a bitter and barbarous opposition. The vigour of the Scottish Protestants strengthened the hands of their English sympathisers. Laud and Charles were executed, Episcopacy was abolished, the use of the Book of Common Prayer was prohibited."

[9] For a description of some of the laws enacted by early theocratic governments in New England, see Parrington, Main Currents in American Thought (1930), Vol. 1, pp. 5–50; Whipple, Our Ancient Liberties (1927), pp. 63–78; Wertenbaker, The Puritan Oligarchy (1947).

tionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five.[10] But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785–1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous "Virginia Bill for Religious Liberty" by which all religious groups were placed on an equal footing so far as the State was concerned.[11] Similar though less far-reaching

[10] The Church of England was the established church of at least five colonies: Maryland, Virginia, North Carolina, South Carolina and Georgia. There seems to be some controversy as to whether that church was officially established in New York and New Jersey but there is no doubt that it received substantial support from those States. See Cobb, The Rise of Religious Liberty in America (1902), pp. 338, 408. In Massachusetts, New Hampshire and Connecticut, the Congregationalist Church was officially established. In Pennsylvania and Delaware, all Christian sects were treated equally in most situations but Catholics were discriminated against in some respects. See generally Cobb, The Rise of Religious Liberty in America (1902). In Rhode Island all Protestants enjoyed equal privileges but it is not clear whether Catholics were allowed to vote. Compare Fiske, The Critical Period in American History (1899), p. 76 with Cobb, The Rise of Religious Liberty in America (1902), pp. 437–438.

[11] 12 Hening, Statutes of Virginia (1823), 84, entitled "An act for establishing religious freedom." The story of the events surrounding the enactment of this law was reviewed in *Everson* v. *Board of Education*, 330 U. S. 1, both by the Court, at pp. 11–13, and in the

legislation was being considered and passed in other States.[12]

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—

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dissenting opinion of Mr. Justice Rutledge, at pp. 33–42. See also Fiske, The Critical Period in American History (1899), pp. 78–82; James, The Struggle for Religious Liberty in Virginia (1900); Thom, The Struggle for Religious Freedom in Virginia: The Baptists (1900); Cobb, The Rise of Religious Liberty in America (1902), pp. 74–115, 482–499.

[12] See Cobb, The Rise of Religious Liberty in America (1902), pp. 482–509.

that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that

laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[13] That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith.[14] The Establishment Clause

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[13] "[A]ttempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens, tend to enervate the laws in general, and to slacken the bands of Society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? and what may be the effect of so striking an example of impotency in the Government, on its general authority." Memorial and Remonstrance against Religious Assessments, II Writings of Madison 183, 190.

[14] "It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits. . . . [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition,

thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.[15] Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand.[16] The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind [17]—a law

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bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy." *Id.*, at 187.

[15] Memorial and Remonstrance against Religious Assessments, II Writings of Madison, at 187.

[16] "[T]he proposed establishment is a departure from that generous policy, which, offering an asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens. What a melancholy mark is the Bill of sudden degeneracy? Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. . . . Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance. The magnanimous sufferer under this cruel scourge in foreign Regions, must view the Bill as a Beacon on our Coast, warning him to seek some other haven, where liberty and philanthropy in their due extent may offer a more certain repose from his troubles." *Id.*, at 188.

[17] 5 & 6 Edward VI, c. 1, entitled "An Act for the Uniformity of Service and Administration of Sacraments throughout the Realm." This Act was repealed during the reign of Mary but revived upon the accession of Elizabeth. See note 7, *supra*. The reasons which led to the enactment of this statute were set out in its preamble: "Where there hath been a very godly Order set forth by the Authority of Parliament, for Common Prayer and Administration of the Sacra-

which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding "unlawful [religious] meetings . . . to the great disturbance and distraction of the good subjects of this kingdom . . . ." [18] And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies.[19] It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an

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ments to be used in the Mother Tongue within the Church of *England*, agreeable to the Word of God and the Primitive Church, very comfortable to all good People desiring to live in Christian Conversation, and most profitable to the Estate of this Realm, upon the which the Mercy, Favour and Blessing of Almighty God is in no wise so readily and plenteously poured as by Common Prayers, due using of the Sacraments, and often preaching of the Gospel, with the Devotion of the Hearers: (1) And yet this notwithstanding, a great Number of People in divers Parts of this Realm, following their own Sensuality, and living either without Knowledge or due Fear of God, do wilfully and damnably before Almighty God abstain and refuse to come to their Parish Churches and other Places where Common Prayer, Administration of the Sacraments, and Preaching of the Word of God, is used upon *Sundays* and other Days ordained to be Holydays."

[18] Bunyan's own account of his trial is set forth in A Relation of the Imprisonment of Mr. John Bunyan, reprinted in Grace Abounding and The Pilgrim's Progress (Brown ed. 1907), at 103–132.

[19] For a vivid account of some of these persecutions, see Wertenbaker, The Puritan Oligarchy (1947).

establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose.[20] And there were men of this same faith in the

[20] Perhaps the best example of the sort of men who came to this country for precisely that reason is Roger Williams, the founder of Rhode Island, who has been described as "the truest Christian amongst many who sincerely desired to be Christian." Parrington, Main Currents in American Thought (1930), Vol. 1, at p. 74. Williams, who was one of the earliest exponents of the doctrine of separation of church and state, believed that separation was necessary in order to protect the church from the danger of destruction which he thought inevitably flowed from control by even the best-intentioned civil authorities: "The unknowing zeale of *Constantine* and other Emperours, did more hurt to *Christ Jesus* his Crowne and Kingdome, then the raging fury of the most bloody *Neroes*. In the *persecutions* of the later, *Christians* were sweet and fragrant, like spice pounded and beaten in morters: But those *good* Emperours, persecuting some erroneous persons, *Arrius, &c.* and advancing the professours of some Truths of Christ (for there was no small number of *Truths* lost in those times) and maintaining their *Religion* by the materiall Sword, I say by this meanes *Christianity* was *ecclipsed*, and the Professors of it fell asleep . . . ." Williams, The Bloudy Tenent, of Persecution, for cause of Conscience, discussed in A Conference betweene Truth and Peace (London, 1644), reprinted in Narragansett Club Publications, Vol. III, p. 184. To Williams, it was no part of the business or competence of a civil magistrate to interfere in religious matters: "[W]hat imprudence and *indiscretion* is it in the most common

power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.[21]

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affaires of Life, to conceive that *Emperours, Kings* and *Rulers* of the earth must not only be qualified with *politicall* and *state abilities* to *make* and *execute* such *Civill Lawes* which may concerne the common *rights, peace* and *safety* (which is worke and businesse, load and burthen enough for the ablest shoulders in the Commonweal) but also furnished with such *Spirituall* and heavenly *abilities* to governe the *Spirituall* and *Christian Commonweale* . . . ." *Id.*, at 366. See also *id.*, at 136–137.

[21] There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

> "[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" [22]

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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[22] Memorial and Remonstrance against Religious Assessments, II Writings of Madison 183, at 185–186.

MR. JUSTICE DOUGLAS, concurring.

It is customary in deciding a constitutional question to treat it in its narrowest form. Yet at times the setting of the question gives it a form and content which no abstract treatment could give. The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing.[1] Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.

First, a word as to what this case does not involve.

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[1] "There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N. Y. A. and W. P. A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G. I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits—15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations—contributions to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state." Fellman, The Limits of Freedom (1959), pp. 40–41.

Plainly, our Bill of Rights would not permit a State or the Federal Government to adopt an official prayer and penalize anyone who would not utter it. This, however, is not that case, for there is no element of compulsion or coercion in New York's regulation requiring that public schools be opened each day with the following prayer:

> "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

The prayer is said upon the commencement of the school day, immediately following the pledge of allegiance to the flag. The prayer is said aloud in the presence of a teacher, who either leads the recitation or selects a student to do so. No student, however, is compelled to take part. The respondents have adopted a regulation which provides that "Neither teachers nor any school authority shall comment on participation or non-participation . . . nor suggest or request that any posture or language be used or dress be worn or be not used or not worn." Provision is also made for excusing children, upon written request of a parent or guardian, from the saying of the prayer or from the room in which the prayer is said. A letter implementing and explaining this regulation has been sent to each taxpayer and parent in the school district. As I read this regulation, a child is free to stand or not stand, to recite or not recite, without fear of reprisal or even comment by the teacher or any other school official.

In short, the only one who need utter the prayer is the teacher; and no teacher is complaining of it. Students can stand mute or even leave the classroom, if they desire.[2]

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[2] West Point Cadets are required to attend chapel each Sunday. Reg., c. 21, § 2101. The same requirement obtains at the Naval Academy (Reg., c. 9, § 0901, (1)(a)), and at the Air Force Academy except First Classmen. Catalogue, 1962–1963, p. 110. And see Honey-

McCollum v. *Board of Education*, 333 U. S. 203, does not decide this case. It involved the use of public school facilities for religious education of students. Students either had to attend religious instruction or "go to some other place in the school building for pursuit of their secular studies. . . . Reports of their presence or absence were to be made to their secular teachers." *Id.*, at 209. The influence of the teaching staff was therefore brought to bear on the student body, to support the instilling of religious principles. In the present case, school facilities are used to say the prayer and the teaching staff is employed to lead the pupils in it. There is, however, no effort at indoctrination and no attempt at exposition. Prayers of course may be so long and of such a character as to amount to an attempt at the religious instruction that was denied the public schools by the *McCollum* case. But New York's prayer is of a character that does not involve any element of proselytizing as in the *McCollum* case.

The question presented by this case is therefore an extremely narrow one. It is whether New York oversteps the bounds when it finances a religious exercise.

What New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court and then added "God save the United States and this Honorable Court." That utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer.

What New York does on the opening of its public schools is what each House of Congress [3] does at the open-

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well, Chaplains of the United States Army (1958); Jorgensen, The Service of Chaplains to Army Air Units, 1917–1946, Vol. I (1961).

[3] The New York Legislature follows the same procedure. See, *e. g.*, Vol. 1, N. Y. Assembly Jour., 184th Sess., 1961, p. 8; Vol. 1, N. Y. Senate Jour., 184th Sess., 1961, p. 5.

ing of each day's business.[4] Reverend Frederick B. Harris is Chaplain of the Senate; Reverend Bernard Braskamp is Chaplain of the House. Guest chaplains of various denominations also officiate.[5]

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[4] Rules of the Senate provide that each calendar day's session shall open with prayer. See Rule III, Senate Manual, S. Doc. No. 2, 87th Cong., 1st Sess. The same is true of the Rules of the House. See Rule VII, Rules of the House of Representatives, H. R. Doc. No. 459, 86th Cong., 2d Sess. The Chaplains of the Senate and of the House receive $8,810 annually. See 75 Stat. 320, 324.

[5] It would, I assume, make no difference in the present case if a different prayer were said every day or if the ministers of the community rotated, each giving his own prayer. For some of the petitioners in the present case profess no religion.

The Pledge of Allegiance, like the prayer, recognizes the existence of a Supreme Being. Since 1954 it has contained the words "one Nation *under God,* indivisible, with liberty and justice for all." 36 U. S. C. § 172. The House Report recommending the addition of the words "under God" stated that those words in no way run contrary to the First Amendment but recognize "only the guidance of God in our national affairs." H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3. And see S. Rep. No. 1287, 83d Cong., 2d Sess. Senator Ferguson, who sponsored the measure in the Senate, pointed out that the words "In God We Trust" are over the entrance to the Senate Chamber. 100 Cong. Rec. 6348. He added:

"I have felt that the Pledge of Allegiance to the Flag which stands for the United States of America should recognize the Creator who we really believe is in control of the destinies of this great Republic.

"It is true that under the Constitution no power is lodged anywhere to establish a religion. This is not an attempt to establish a religion; it has nothing to do with anything of that kind. It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation." *Ibid.* And see 100 Cong. Rec. 7757 *et seq.* for the debates in the House.

The Act of March 3, 1865, 13 Stat. 517, 518, authorized the phrase "In God We Trust" to be placed on coins. And see 17 Stat. 427. The first mandatory requirement for the use of that motto on coins

In New York the teacher who leads in prayer is on the public payroll; and the time she takes seems minuscule as compared with the salaries appropriated by state legislatures and Congress for chaplains to conduct prayers in the legislative halls. Only a bare fraction of the teacher's time is given to reciting this short 22-word prayer, about the same amount of time that our Crier spends announcing the opening of our sessions and offering a prayer for this Court. Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.[6] It is said that the

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was made by the Act of May 18, 1908, 35 Stat. 164. See H. R. Rep. No. 1106, 60th Cong., 1st Sess.; 42 Cong. Rec. 3384 *et seq.* The use of the motto on all currency and coins was directed by the Act of July 11, 1955, 69 Stat. 290. See H. R. Rep. No. 662, 84th Cong., 1st Sess.; S. Rep. No. 637, 84th Cong., 1st Sess. Moreover, by the Joint Resolution of July 30, 1956, our national motto was declared to be "In God We Trust." 70 Stat. 732. In reporting the Joint Resolution, the Senate Judiciary Committee stated:

"Further official recognition of this motto was given by the adoption of the Star-Spangled Banner as our national anthem. One stanza of our national anthem is as follows:

" 'O, thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation!
Blest with vict'ry and peace may the heav'n rescued land
Praise the power that hath made and preserved us a nation!
Then conquer we must when our cause it is just,
And this be our motto—"In God is our trust."
And the Star-Spangled Banner in triumph shall wave
O'er the land of the free and the home of the brave.'

"In view of these words in our national anthem, it is clear that 'In God we trust' has a strong claim as our national motto." S. Rep. No. 2703, 84th Cong., 2d Sess., p. 2.

[6] The fact that taxpayers do not have standing in the federal courts to raise the issue. (*Frothingham* v. *Mellon*, 262 U. S. 447) is of course no justification for drawing a line between what is done in New York on the one hand and on the other what we do and what Congress does in this matter of prayer.

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element of coercion is inherent in the giving of this prayer. If that is true here, it is also true of the prayer with which this Court is convened, and of those that open the Congress. Few adults, let alone children, would leave our courtroom or the Senate or the House while those prayers are being given. Every such audience is in a sense a "captive" audience.

At the same time I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words.[7] A religion is not established in the usual sense merely by letting those who choose to do so say the prayer that the public school teacher leads. Yet once government finances a religious exercise it inserts a divisive influence into our communities.[8] The New York Court said that the prayer given does not conform to all of the tenets of the Jewish, Unitarian, and Ethical Culture groups. One of the petitioners is an agnostic.

"We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. 306, 313. Under our Bill of Rights free play is given for

[7] The Court analogizes the present case to those involving the traditional Established Church. We once had an Established Church, the Anglican. All baptisms and marriages had to take place there. That church was supported by taxation. In these and other ways the Anglican Church was favored over the others. The First Amendment put an end to placing any one church in a preferred position. It ended support of any church or all churches by taxation. It went further and prevented secular sanction to any religious ceremony, dogma, or rite. Thus, it prevents civil penalties from being applied against recalcitrants or nonconformists.

[8] Some communities have a Christmas tree purchased with the taxpayers' money. The tree is sometimes decorated with the words "Peace on earth, goodwill to men." At other times the authorities draw from a different version of the Bible which says "Peace on earth to men of goodwill." Christmas, I suppose, is still a religious celebration, not merely a day put on the calendar for the benefit of merchants.

making religion an active force in our lives.[9] But "if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." *McGowan* v. *Maryland,* 366 U. S. 420, 563 (dissenting opinion). By reason of the First Amendment government is commanded "to have no interest in theology or ritual" (*id.,* at 564), for on those matters "government must be neutral." *Ibid.* The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

My problem today would be uncomplicated but for *Everson* v. *Board of Education,* 330 U. S. 1, 17, which allowed taxpayers' money to be used to pay "the bus fares of parochial school pupils as a part of a general program under which" the fares of pupils attending public and other schools were also paid. The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy:

> "The reasons underlying the Amendment's policy have not vanished with time or diminished in force.

[9] Religion was once deemed to be a function of the public school system. The Northwest Ordinance, which antedated the First Amendment, provided in Article III that "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

> Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. Madison's Remonstrance, Par. 6, 8. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. For when it comes to rest upon that secular foundation it vanishes with the resting. *Id.*, Par. 7, 8. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups. *Id.*, Par. 8, 11. It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms. *Ibid.* The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions. *Id.*, Par. 11." *Id.*, pp. 53–54.

What New York does with this prayer is a break with that tradition. I therefore join the Court in reversing the judgment below.

MR. JUSTICE STEWART, dissenting.

A local school board in New York has provided that those pupils who wish to do so may join in a brief prayer at the beginning of each school day, acknowledging their dependence upon God and asking His blessing upon them

and upon their parents, their teachers, and their country. The Court today decides that in permitting this brief nondenominational prayer the school board has violated the Constitution of the United States. I think this decision is wrong.

The Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion. For the state courts have made clear that those who object to reciting the prayer must be entirely free of any compulsion to do so, including any "embarrassments and pressures." Cf. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. But the Court says that in permitting school children to say this simple prayer, the New York authorities have established "an official religion."

With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. England had then and has now an established church. Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own States. For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so. Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation," a phrase nowhere to

be found in the Constitution. What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.

At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, "God save the United States and this Honorable Court." [1] Both the Senate and the House of Representatives open their daily Sessions with prayer.[2] Each of our Presidents, from George Washington to John F. Kennedy, has upon assuming his Office asked the protection and help of God.[3]

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[1] See Warren, The Supreme Court in United States History, Vol. 1, p. 469.

[2] See Rule III, Senate Manual, S. Doc. No. 2, 87th Cong., 1st Sess. See Rule VII, Rules of the House of Representatives, H. R. Doc. No. 459, 86th Cong., 2d Sess.

[3] For example:

On April 30, 1789, President George Washington said:

> ". . . it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. . . .
>
> . . . . . .
>
> "Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall

Footnote 3—Continued.

take my present leave; but not without resorting once more to the benign Parent of the Human Race in humble supplication that, since He has been pleased to favor the American people with opportunities for deliberating in perfect tranquillity, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union and the advancement of their happiness, so His divine blessing may be equally *conspicuous* in the enlarged views, the temperate consultations, and the wise measures on which the success of this Government must depend."

On March 4, 1797, President John Adams said:

"And may that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation and its Government and give it all possible success and duration consistent with the ends of His providence."

On March 4, 1805, President Thomas Jefferson said:

". . . I shall need, too, the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence and our riper years with His wisdom and power, and to whose goodness I ask you to join in supplications with me that He will so enlighten the minds of your servants, guide their councils, and prosper their measures that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations."

On March 4, 1809, President James Madison said:

"But the source to which I look . . . is in . . . my fellow-citizens, and in the counsels of those representing them in the other departments associated in the care of the national interests. In these my confidence will under every difficulty be best placed, next to that which we have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future."

[*Footnote 3 continued on p. 448*]

Footnote 3—Continued.

On March 4, 1865, President Abraham Lincoln said:

". . . Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said 'the judgments of the Lord are true and righteous altogether.'

"With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."

On March 4, 1885, President Grover Cleveland said:

". . . And let us not trust to human effort alone, but humbly acknowledging the power and goodness of Almighty God, who presides over the destiny of nations, and who has at all times been revealed in our country's history, let us invoke His aid and His blessing upon our labors."

On March 5, 1917, President Woodrow Wilson said:

". . . I pray God I may be given the wisdom and the prudence to do my duty in the true spirit of this great people."

On March 4, 1933, President Franklin D. Roosevelt said:

"In this dedication of a Nation we humbly ask the blessing of God. May He protect each and every one of us. May He guide me in the days to come."

On January 21, 1957, President Dwight D. Eisenhower said:

"Before all else, we seek, upon our common labor as a nation, the blessings of Almighty God. And the hopes in our hearts fashion the deepest prayers of our whole people."

On January 20, 1961, President John F. Kennedy said:

"The world is very different now. . . . And yet the same revolutionary beliefs for which our forebears fought are still at issue around the globe—the belief that the rights of man come

The Court today says that the state and federal governments are without constitutional power to prescribe any particular form of words to be recited by any group of the American people on any subject touching religion.[4] One of the stanzas of "The Star-Spangled Banner," made our National Anthem by Act of Congress in 1931,[5] contains these verses:

> "Blest with victory and peace, may the heav'n rescued land
> Praise the Pow'r that hath made and preserved us a nation!
> Then conquer we must, when our cause it is just,
> And this be our motto 'In God is our Trust.' "

In 1954 Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation *under God,* indivisible, with liberty and justice for all." [6] In 1952 Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer.[7] Since 1865 the words "IN GOD WE TRUST" have been impressed on our coins.[8]

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not from the generosity of the state but from the hand of God.

. . . . .

"With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own."

[4] My brother DOUGLAS says that the only question before us is whether government "can constitutionally finance a religious exercise." The official chaplains of Congress are paid with public money. So are military chaplains. So are state and federal prison chaplains.

[5] 36 U. S. C. § 170.

[6] 36 U. S. C. § 172.

[7] 36 U. S. C. § 185.

[8] 13 Stat. 517, 518; 17 Stat. 427; 35 Stat. 164; 69 Stat. 290. The current provisions are embodied in 31 U. S. C. §§ 324, 324a.

Countless similar examples could be listed, but there is no need to belabor the obvious.[9] It was all summed up by this Court just ten years ago in a single sentence: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U. S. 306, 313.

I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an "official religion" in violation of the Constitution. And I do not believe the State of New York has done so in this case. What each has done has been to recognize and to follow the deeply entrenched and highly cherished spiritual traditions of our Nation—traditions which come down to us from those who almost two hundred years ago avowed their "firm Reliance on the Protection of divine Providence" when they proclaimed the freedom and independence of this brave new world.[10]

I dissent.

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[9] I am at a loss to understand the Court's unsupported *ipse dixit* that these official expressions of religious faith in and reliance upon a Supreme Being "bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." See *ante*, p. 435, n. 21. I can hardly think that the Court means to say that the First Amendment imposes a lesser restriction upon the Federal Government than does the Fourteenth Amendment upon the States. Or is the Court suggesting that the Constitution permits judges and Congressmen and Presidents to join in prayer, but prohibits school children from doing so?

[10] The Declaration of Independence ends with this sentence: "And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."

STATE BOARD OF INSURANCE ET AL. *v.* TODD SHIPYARDS CORP.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT.

No. 144. Argued March 21, 1962.—
Decided June 25, 1962.

Respondent is incorporated and domiciled in New York; but it does business and owns real and personal property in Texas. It sued to recover taxes levied and collected by Texas on insurance covering its property in Texas. All transactions pertaining to such insurance took place outside of Texas. The insurers were domiciled in London and were not licensed in Texas and did no business and had no office or agents in Texas. The insurance was bought and issued in New York and the premiums thereon and claims thereunder were payable in New York. *Held:* In the light of the history and provisions of the McCarran-Ferguson Act, 59 Stat. 33, the Texas tax on these wholly out-of-state transactions is invalid. Pp. 452–458.

340 S. W. 2d 339, affirmed.

Bob E. Shannon and *Fred B. Werkenthin,* Assistant Attorneys General of Texas, argued the cause for petitioners. With them on the briefs were *Will Wilson,* Attorney General, *C. K. Richards* and *Coleman Gay III,* Assistant Attorneys General.

Charles R. Vickery, Jr. argued the cause for respondent. With him on the briefs was *Frank A. Liddell.*

Cloyd Laporte and *John Mason Harding* filed a brief for the Church Fire Insurance Corp. et al., as *amici curiae,* urging affirmance.

Jack P. F. Gremillion, Attorney General of Louisiana, filed a brief for the State of Louisiana, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

When we held in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, that the modern business of insurance was "interstate commerce," we put it in a category which Congress could regulate and which, if our prior decisions controlled, could not in some respects be regulated by the States, even in absence of federal regulation. See Frankfurter, The Commerce Clause (1937); Rutledge, A Declaration of Legal Faith (1947).

Congress promptly passed the McCarran-Ferguson Act, 59 Stat. 33, 15 U. S. C. § 1011, which provided that the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause.[1] Subsequently, by force of the McCarran-Ferguson Act, we upheld the continued taxation and regulation by the States of interstate insurance transactions. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408.

Prior to the *South-Eastern Underwriters* decision, we had given broad scope to local regulation of the insurance business. *Osborn* v. *Ozlin*, 310 U. S. 53; *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313. The *Osborn* case upheld a Virginia requirement that insurance companies authorized to do business in that State must write policies through resident agents. The *Hoopeston* case, while it involved the making of out-of-state insurance

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[1] 15 U. S. C. § 1011 provides:

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

15 U. S. C. § 1012 provides, so far as relevant here:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

contracts, also involved servicing of policies in New York, the regulating State.

Here, unlike the *Osborn* and *Hoopeston* cases, the insurance companies carry on no activities within the State of Texas. Of course, the insured does business in Texas and the property insured is located there. It is earnestly argued that, unless the philosophy of the *Osborn* and *Hoopeston* decisions is to be restricted, the present Texas tax [2] on premiums paid out-of-state on out-of-state contracts should be sustained. We are urged to follow the approach of the *Osborn* and *Hoopeston* decisions, look to the aspects of the insurance transactions taken as a whole, and decide that there are sufficient contacts with Texas to justify this tax under the requirements of due process.

Were the *Osborn* and *Hoopeston* cases and the bare bones of the McCarran-Ferguson Act our only criteria for decision, we would have presented the question whether three prior decisions—*Allgeyer* v. *Louisiana,* 165 U. S. 578; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Connecticut General Life Ins. Co.* v. *Johnson,* 303 U. S. 77—have continuing vitality. The first two were distinguished in the *Osborn* (310 U. S., at 66–67) and *Hoopeston* (318 U. S., at 318–319) cases. The *Allgeyer* case held that Louisiana by reason of the Due Process Clause of the Fourteenth Amendment could not make it a misdemeanor

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[2] 14 Vernon's Tex. Civ. Stat., 1952 (Cum. Supp. 1961), Art. 21.38, § 2 (e) provides:

"If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

to effect insurance on Louisiana risks with an insurance company not licensed to do business in Louisiana, where the insured through use of the mails contracted in New York for the policy. The *St. Louis Cotton Compress* case held invalid under the Due Process Clause an Arkansas tax on the premiums paid for a policy on Arkansas risks, made with an out-of-state company having no office or agents in Arkansas. The *Connecticut General Life Insurance* case held invalid under the Due Process Clause a California tax on premiums paid in Connecticut by one insurance company to another for reinsurance of life insurance policies written in California on California residents, even though both insurance companies were authorized to do business in California. The Court stated:

> "All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." 303 U. S., at 82.

The Texas Court of Civil Appeals, 340 S. W. 2d 339, and the Texas Supreme Court, feeling bound by these decisions, held the tax on premiums unconstitutional, 162 Tex. 8, 343 S. W. 2d 241. We granted certiorari, 368 U. S. 810.

The insurance transactions involved in the present litigation take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do busi-

ness in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

The insured is not a domiciliary of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York City. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

We need not decide *de novo* whether the results (and the reasons given) in the *Allgeyer, St. Louis Cotton Compress,* and *Connecticut General Life Insurance* decisions are sound and acceptable. For we have in the history of the McCarran-Ferguson Act an explicit, unequivocal statement that the Act was so designed as not to displace those three decisions. The House Report stated:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or

> domiciled therein covering risks within the State or to regulate such transactions in any way." H. R. Rep. No. 143, 79th Cong., 1st Sess., p. 3.

Senator McCarran, after reading the foregoing part of the House Report during the Senate debate, stated, ". . . we give to the States no more powers than those they previously had, and we take none from them." 91 Cong. Rec. 1442.

So, while Congress provided in 15 U. S. C. § 1012 (a) that the insurance business "shall be subject to the laws of the several States which relate to the regulation or taxation of such business," [3] it indicated without ambiguity that such state "regulation or taxation" should be kept within the limits set by the *Allgeyer, St. Louis Cotton Compress,* and *Connecticut General Life Insurance* decisions.

The power of Congress to grant protection to interstate commerce against state regulation or taxation (*Bethlehem Steel Co.* v. *State Board,* 330 U. S. 767, 775–776; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 235–236) or to withhold it (*In re Rahrer,* 140 U. S. 545, 560 *et seq.; Prudential Ins. Co.* v. *Benjamin, supra*) is so complete [4] that its ideas of policy should prevail.

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[3] *Supra,* note 1.

[4] As we stated in *Prudential Ins. Co.* v. *Benjamin, supra,* at 434:

"The power of Congress over commerce exercised entirely without reference to coordinated action of the states is not restricted, except as the Constitution expressly provides, by any limitation which forbids it to discriminate against interstate commerce and in favor of local trade. Its plenary scope enables Congress not only to promote but also to prohibit interstate commerce, as it has done frequently and for a great variety of reasons. That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states."

Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. And while Congress has authority by § 5 of that Amendment to enforce its provisions (*Ex parte Virginia,* 100 U. S. 339; *Monroe* v. *Pape,* 365 U. S. 167), the McCarran-Ferguson Act does not purport to do so. We have, of course, freedom to change our decisions on the constitutionality of laws. *Smith* v. *Allwright,* 321 U. S. 649, 665. But the policy announced by Congress in the McCarran-Ferguson Act was one on which the industry had reason to rely since 1897, when the *Allgeyer* decision was announced; and we are advised by an *amicus* brief how severe the impact would be on small insurance companies should the old rule be changed. When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions (see *Federal Trade Comm'n* v. *Travelers Health Assn.,* 362 U. S. 293, 301–302), we should be loath to change them.

We have accepted the *status quo* in comparable situations. After this Court held in *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, that a State could not provide compensation to stevedores doing maritime work, Congress enacted the Longshoremen's Act. See S. Rep. No. 973, 69th Cong., 1st Sess., p. 16; H. R. Rep. No. 1767, 69th Cong., 2d Sess., p. 20. In *Davis* v. *Department of Labor,* 317 U. S. 249, we took note of the passage of laws which "accepted the *Jensen* line of demarcation between state and federal jurisdiction" (*id.,* at 256), which line we also accepted in spite of the fact that the *Jensen* case had become in the eyes of some a derelict in the stream of the law.

In *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356, 357, we refused to re-examine a prior decision holding baseball not to be covered by the antitrust laws, stating that "[t]he business has thus been left for thirty years to develop, on the understanding that it was not sub-

ject to existing antitrust legislation." In that case Congress had remained silent, not changing the law. Here Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from disturbing them lest we change the design that Congress fashioned.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, dissenting.

In holding that the McCarran-Ferguson Act withdrew from the States the power to tax the ownership and use of insurance policies on property located within their borders merely because those policies were made by representatives of the insurer and the insured in another State, I think the Court places an unwarranted construction upon that Act which may seriously impair the capacity of Texas and other States to provide and enforce effective regulation of the insurance business. The Texas statute held invalid was enacted by the State Legislature in 1957 in order to protect the State's comprehensive supervision of insurance companies and their policies from being undercut by the practice of insuring Texas property with insurance companies not authorized to do business in that State. Prior to 1957, the whole cost of the Texas program had been placed upon those insurance companies which had subjected themselves to Texas regulation and taxation by qualifying to do business in the State. The 1957 statute was passed for the express purpose of equalizing that burden by placing a tax upon the purchasers of

unregulated insurance roughly equal to that imposed directly upon regulated companies. In this way the State tried to protect its qualified and regulated companies from unfair competition by companies which could sell insurance on Texas property cheaper because they did not have to pay their part of the cost of the Texas insurance regulation program. The Court's construction of the McCarran-Ferguson Act bars Texas from providing this sort of protection to regulated companies. This holding seems to me to threaten the whole foundation of the Texas regulatory program for it plainly encourages Texas residents to insure their property with unregulated companies and discourages out-of-state companies from qualifying to do business in and subjecting themselves to regulation and taxation by the State of Texas.

I cannot believe that an Act which was basically designed to leave the power to regulate and tax insurance companies to the States was intended to have any such effect. The McCarran-Ferguson Act "declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States"—a declaration which is not qualified by any other language of the Act. Nothing in the legislative history which the Court relies upon persuades me that we should read this Act in a way which so seriously impairs the power of the States to discharge their responsibilities under the Act to provide a comprehensive, effective, well-integrated program for regulating insurance on property within their borders. I think the McCarran-Ferguson Act left Texas with adequate power to place a tax on the ownership and use of insurance policies covering the vast properties owned and operated by this respondent in Texas, and I therefore dissent.

UNITED STATES *v.* BORDEN COMPANY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 439. Argued April 24–25, 1962.—Decided June 25, 1962.

The Government brought this suit to enjoin appellees from selling fluid milk in the Chicago area at prices which discriminate between independently owned grocery stores and grocery store chains, in violation of § 2 (a) of the Clayton Act. The District Court found that the pricing plan of each appellee was a prima facie violation of § 2 (a); but it concluded that these discriminatory prices were justified under the proviso of § 2 (a) which permits price differentials which make only "due allowance for differences in the cost of manufacture, sale, or delivery." In doing so, it relied upon a showing by appellees that the *average* cost of sales and deliveries to *all* chain stores was lower than the *average* cost of sales and deliveries to *all* independent stores. *Held:* The class cost justifications submitted to the District Court by appellees did not satisfy their burden under § 2 (b) of showing that their respective discriminatory pricing plans reflected only a "due allowance" for actual cost differences, since there was not a sufficient resemblance of the individual members of each class in the essential cost-determinative factors on which the classifications were based. Pp. 461–472.

Reversed and remanded.

Richard A. Solomon argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Loevinger* and *Elliott H. Moyer.*

Stuart S. Ball argued the cause for The Borden Company, appellee. With him on the briefs was *H. Blair White.*

John Paul Stevens argued the cause for Bowman Dairy Company, appellee. With him on the briefs was *L. Edward Hart.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a direct appeal [1] from a judgment dismissing the Government's Section 2 (a) Clayton Act [2] suit in which it sought an injunction against the selling of fluid milk products by the appellees, The Borden Company and Bowman Dairy Company, at prices which discriminate between independently owned grocery stores and grocery store chains. The District Court in an unreported decision found the pricing plan of each dairy to be a prima facie violation of § 2 (a) but concluded that these discriminatory prices were legalized by the cost justification proviso of § 2 (a), which permits price differentials as long as they "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." To review the Government's contention that the District Court had improperly permitted cost justifications based on the *average* cost of dealing with broad groups of customers unrelated in

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[1] Jurisdiction is conferred under § 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. § 29.

[2] "SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ." 38 Stat. 730, as amended, 49 Stat. 1526, 15 U. S. C. § 13 (a).

cost-saving factors,[3] we noted probable jurisdiction, 368 U. S. 924, and directed the parties to brief and argue the case separately as to each appellee, 368 U. S. 963. However, finding the same problem at the root of the cost justifications of each appellee, we have dealt with both in this single opinion. We have concluded that the class cost justifications submitted to the District Court by the appellees did not satisfy their burden of showing that their respective discriminatory pricing plans reflected only a "due allowance" for cost differences.

By way of background, we first point out that the present appeal is merely a glimpse of protracted litigation between the parties which began in 1951 and which has not yet seen its end. The original complaint charged violations of §§ 1 and 2 of the Sherman Act and § 2 (a) of the Clayton Act. The District Court dismissed the suit, holding that there was no proof of the alleged Sherman Act violations and that no equitable relief was necessary under the Clayton Act charge because appellees were already restrained by a consent decree entered in a private antitrust case. 111 F. Supp. 562. On direct appeal we affirmed the dismissal of the Sherman Act charges but held erroneous the refusal to grant an injunction on the Clayton Act claim solely because of the existence of the private decree. 347 U. S. 514. On remand the case was reopened and on its prima facie case the Government introduced recent general price schedules and illustrated their effect on sample stores to show that each appellee was still engaged in illegal price discrimina-

[3] Bowman's contention that the Government by stipulation limited itself to specific objections which do not include the present one is without foundation in the record. At the time the stipulation was proposed, the trial court made it quite clear that the Government by so stipulating was not waiving its right to argue the legal sufficiency of the proffered cost studies.

tions notwithstanding the consent decree. In defense the appellees each introduced voluminous cost studies in justification of their pricing systems. The entire case was submitted via stipulations, depositions, and briefs. There was no dispute as to the existence of price discrimination; the sole question was whether the differences in price reflected permissible allowances for variances in cost.

In view of our disposition, we need not relate the facts in detail. Both appellees are major distributors of fluid milk products in metropolitan Chicago. The sales of both dairies to retail stores during the period in question were handled under plans which gave most of their customers—the independently owned stores—percentage discounts off list price which increased with the volume of their purchases to a specified maximum while granting a few customers—the grocery store chains—a flat discount without reference to volume and substantially greater than the maximum discount available under the volume plan offered independent stores. These discounts were made effective through schedules which appeared to cover all stores; however, the schedules were modified by private letters to the grocery chains confirming their higher discounts.[4] Although the two sets of discounts were never

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[4] Borden in June of 1954 issued the following discount schedule to "be applied to all purchases of Borden's fresh milk":

Average converted units per day:	*Percent of discounts*
0– 24	0
25– 74	2
75–149	3
150 and over	4

At this same time, letters were sent to The Great Atlantic and Pacific Tea Company and The Jewel Food Stores granting them flat 8½% discounts. A few of the larger independents by special arrangement were given an additional 1½% discount, thereby raising their total discount to 5½%. [*Footnote 4 continued on p. 464*]

officially labeled "independent" and "chain" prices, they were treated, called, and regarded as such throughout the record.

To support their defense that the disparities in price between independents and chains were attributable to differences in the cost of dealing with the two types of

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In September 1955, Borden discontinued the above discount system and utilized a net price scheme which resulted in even greater disparities between chains and independents.

Bowman in June of 1954 operated under the following "Resale Store Discount Schedule":

Average converted points per day:	*Percent of discounts*
0 to 10	3.0 to 3.4
10 to 20	3.4 to 3.8
20 to 30	3.8 to 4.2
30 to 40	4.2 to 4.6
40 to 50	4.6 to 5.0
50 to 60	5.0 to 5.2
60 to 70	5.2 to 5.4
70 to 80	5.4 to 5.6
80 to 90	5.6 to 5.8
90 to 100	5.8 to 6.0
100 to 110	6.0 to 6.2
110 to 120	6.2 to 6.4
120 to 130	6.4 to 6.6
130 to 140	6.6 to 6.8
140 to 150	6.8 to 7.0

This schedule was modified in August by the addition of the following discounts:

Average converted points per day:	*Percent of discounts*
150 to 200	7.0 to 8.0
Over 200	8.0

During this same period Bowman by letter granted The Great Atlantic and Pacific Tea Company and The Kroger Company flat 11% discounts. Goldblatt Bros., also a multi-store operation, was granted a flat 8½%.

In 1955 and again in 1956 Bowman modified the brackets and percentages of its discount schedules, but not in a manner which reduced the disparity between independents and chains.

customers, the appellees introduced cost studies which will be described separately because of their differing content and analytical approach.

The Borden pricing system produced two classes of customers. The two chains, A & P and Jewel, with their combined total of 254 stores constituted one class. The 1,322 independent stores, grouped in four brackets based on the volume of their purchases, made up the other. Borden's cost justification was built on comparisons of its average cost per $100 of sales to the chains in relation to the average cost of similar sales to each of the four groups of independents. The costs considered were personnel (including routemen, clerical and sales employees), truck expenses, and losses on bad debts and returned milk. Various methods of cost allocation were utilized: Drivers' time spent at each store was charged directly to that store; certain clerical expenses were allocated between the two general classes; costs not susceptible of either of the foregoing were charged to the various stores on a per stop, per store, or volume basis.

Bowman's cost justification was based on differences in volume and methods of delivery. It relied heavily upon a study of the cost per minute of its routemen's time. It determined that substantial portions of this time were devoted to three operations, none of which were ever performed for the 163 stores operated by its two major chain customers.[5] These added work steps arose from the method of collection, *i. e.*, cash on delivery and the delayed collections connected therewith, and the performance of "optional customer services." The customer services, performed with varying frequency depending upon the circumstances, included "services that the driver may be requested to do, such as deliver the order inside, place the containers in a refrigerator, rearrange

[5] The third chain, Goldblatt Bros., also did not take these services.

containers so that any product remaining unsold from yesterday will be sold first today, leave cases of products at different spots in the store, etc." The experts conducting the study calculated as to these elements a "standard" cost per unit of product delivered: the aggregate time required to perform the services, as determined by sample time studies, was divided by the total number of units of product delivered. In essence, the Bowman justification was merely a comparison of the cost of these services in relation to the disparity between the chain and independent prices. Although it was shown that the five sample independents in the Government's prima facie case received the added services,[6] it was not shown or found that all 2,500 independents supplied by Bowman partook of them. On the basis of its studies Bowman estimated that about two-thirds of the independent stores received the "optional customer services" on a daily basis and that "most store customers pay the driver in cash daily."

On these facts, stated here in rather summary fashion, the trial court held that appellees had met the requirements of the proviso of § 2 (a) on the theory that the general cost differences between chain stores as a class and independents as a class justified the disparities in price reflected in appellees' schedules. In so doing the trial court itself found "the studies . . . imperfect in

[6] The contention is made that the Government limited its prima facie case to a few stores on some routes and that therefore cost justification was only necessary as to them. This overlooks the fact that sampling has long been a recognized technique in price discrimination cases and that this offering was in support of the Government's position, found valid by the trial court, that the entire Chicago pricing scheme of each appellee, as evidenced by its published price lists, was in violation of § 2 (a). In addition, appellee's cost justifications were not limited to the Government's sample stores.

some respects . . . ." It noted the "seemingly arbitrary" nature of a classification resulting "in percentage discounts which do not bear a direct ratio to differences in volume of sales." But it found "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores." [7] We believe it was erroneous for the trial court to permit cost justifications based upon such classifications.

The burden, of course, was upon the appellees to prove that the illegal price discrimination, which the Government claimed and the trial court found present, was immunized by the cost justification proviso of § 2 (a). Such is the mandate of § 2 (b) as interpreted by this Court in *Federal Trade Comm'n* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948).[8] There can be no doubt that the § 2 (a) proviso as amended by the Robinson-Patman Act contemplates, both in express wording and legislative history, a showing of actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered.[9] The only

[7] Even the trial court was unwilling to give its "stamp of approval to all pricing policies and practices revealed by the evidence." But it concluded that to enjoin such practices would lead to regulation and would require the court continually "to pass judgment on the pricing practices of these defendants," a matter which might better be handled by proceedings before the Federal Trade Commission.

[8] Sec. 2 (b). "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . ." 49 Stat. 1526, 15 U. S. C. § 13 (b).

[9] For a collection and discussion of the pertinent legislative history as well as the cases and treatises on the § 2 (a) proviso, see Rowe, Price Discrimination Under the Robinson-Patman Act, c. 10 (1962).

question before us is how accurate this showing must be in relation to each particular purchaser.

Although the language of the proviso, with some support in the legislative history,[10] is literally susceptible of a construction which would require any discrepancy in price between any two purchasers to be individually justified, the proviso has not been so construed by those charged with its enforcement. The Government candidly recognizes in its briefs filed in the instant case that "[a]s a matter of practical necessity . . . when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices for each customer." In this same vein, the practice of grouping customers for pricing purposes has long had the approval of the Federal Trade Commission.[11] We ourselves have noted the "elusiveness of cost data" in a Robinson-Patman Act proceeding. *Automatic Canteen Co.* v. *Federal Trade Comm'n,* 346 U. S. 61, 68 (1953). In short, to completely renounce class pricing as justified by class accounting would be to eliminate in practical effect the cost justification proviso as to sellers having a large number of purchasers, thereby preventing such sellers from passing on economies to their customers. It seems hardly necessary to say that such a result is at war with Congress' language and purpose.

But this is not to say that price differentials can be justified on the basis of arbitrary classifications or even

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[10] For instance, the Chairman of the Conference on the Bill reported to the House: "The differential granted a particular customer must be traceable to some difference between him and other particular customers, either in the quantities purchased by them or in the methods by which they are purchased or their delivery taken." 80 Cong. Rec. 9417 (1936).

[11] For a discussion of the Commission's position in this regard, see Rowe, *op. cit., supra,* note 9, § 10.6.

classifications which are representative of a numerical majority of the individual members. At some point practical considerations shade into a circumvention of the proviso. A balance is struck by the use of classes for cost justification which are composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member.[12] High on the list of "musts" in the use of the average cost of customer groupings under the proviso of § 2 (a) is a close resemblance of the individual members of each group on the essential point or points which determine the costs considered.

In this regard we do not find the classifications submitted by the appellees to have been shown to be of sufficient homogeneity. Certainly, the cost factors considered were not necessarily encompassed within the manner in which a customer is owned. Turning first to Borden's justification, we note that it not only failed to show that the economies relied upon were isolated within the favored class but affirmatively revealed that members of the classes utilized were substantially unlike in the cost saving aspects considered. For instance, the favorable cost comparisons between the chains and the larger independents were for the greater part controlled by the higher average volume of the chain stores in comparison to the average volume of the 80-member class to which these independents were relegated. The District Court allowed this manner of justification because "most chain stores do purchase larger volumes of milk than do most independent stores." However, such a grouping for cost justification purposes, composed as it is of some independents

[12] Advisory Committee on Cost Justification, Report to the United States Federal Trade Commission (1956), p. 8.

having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit. As the Federal Trade Commission said in *In the Matter of Champion Spark Plug Co.*, 50 F. T. C. 30, 43 (1953): "A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination." This volume gap between the larger independents and the chain stores was further widened by grouping together the two chains, thereby raising the average volume of the stores of the smaller of the two chains in relation to the larger independents. Nor is the vice in the Borden class justification solely in the paper volumes relied upon, for it attributed to many independents cost factors which were not true indicia of the cost of dealing with those particular consumers. To illustrate, each independent was assigned a portion of the total expenses involved in daily cash collections, although it was not shown that all independents paid cash and in fact Borden admitted only that a "large majority" did so.

Likewise the details of Bowman's cost study show a failure in classification. Only one additional point need be made. Its justification emphasized its costs for "optional customer service" and daily cash collection with the resulting "delay to collect." As shown by its study these elements were crucial to Bowman's cost justification. In the study the experts charged all independents and no chain store with these costs. Yet, it was not shown that all independents received these services daily or even on some lesser basis. Bowman's studies indicated only that a large majority of independents took these services on a daily basis. Under such circumstances

the use of these cost factors across the board in calculating independent store costs is not a permissible justification, for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility, and this burden has not been met here. If these factors control the cost of dealing, then their presence or absence might with more justification be the password for admission into the various price categories.[13]

The appellees argue in the alternative that their cost justifications can be sufficiently unscrambled to remove any taint the Court may find in them and still show a cost gap sufficient to justify the price disparity between the chains and any independent. This mass of underlying statistical data not considered by the trial court and now tied together by untried theories can best be evaluated on remand, and we therefore do not consider its sufficiency here.

In sum, the record here shows that price discriminations have been permitted on the basis of cost differences between broad customer groupings, apparently based on the nature of ownership but in any event not shown to be so homogeneous as to permit the joining together of these purchasers for cost allocations purposes. If this is the only justification for appellees' pricing schemes, they are illegal. We do not believe that an appropriate decree would require the trial court continuously to "pass judgment on the pricing practices of these defendants." As to the issuance of an injunction, however, the case is now

[13] Another suspect feature is that classifications based on services received by independents were apparently frozen—making it impossible for them to obtain larger discounts by electing not to receive the cost-determinative services—with no justifiable business reason offered in support of the practice.

11 years old and we have no way of knowing whether equitable relief is in order. Certainly a relevant factor in such consideration would be whether the practices described above are still being followed in any form. This the record here does not show. Such matters can only be ascertained upon the presently existing facts and the careful application of the principles we have enunciated. For that purpose the case is

Reversed and remanded.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

This is not a case that involves problems of centralized purchasing by a large enterprise for all its constituent members, where the volume involved reduces the unit cost. We have here purchases by constituent members of chain stores of milk and milk products that will be sold at the particular store. The competitor is not a member of a competing chain or, if it is, the chain of which it is a part is a smaller one. The costs studies here involved have little, if any, relation to centralized management. They in the main pertain to two factors of cost. First, is the volume of sales of milk and milk products to the individual store and the method of payment. Second, the degree to which the store relieves the seller of milk and milk products from the costs of handling the product as it enters the store, of stacking or storing the products, and of returning the empty bottles or cartons.

The changes in the Clayton Act made by the Robinson-Patman Act now before us were made to limit discounts as "instruments of favor and privilege and weapons of competitive oppression." S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5; H. R. Rep. No. 2287, 74th Cong., 2d Sess.,

p. 9. The allowance by § 2 (a) of "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" was explained as follows:

> "This limits the differences in cost which may justify price differentials strictly *to those actual differences traceable to the particular buyer* for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy.
>
> "But such differentials whether they arise in operating or overhead cost must, as is plainly stated in the phrase quoted above, be those resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.
>
> "This, in its plain meaning, permits differences in overhead where they can actually be shown as between the customers or classes of customers concerned, but *it precludes differentials based on the imputation of overhead to particular customers,* or the exemption of others from it, *where such overhead represents facilities or activities* inseparable from the seller's business as a whole and *not attributable to the business of particular customers* or of the particular customers concerned in the discrimination. It leaves open as a question of fact in each case whether the differences in cost urged in justification of a price differential—whether of operating or of overhead costs—is of one kind or the other. That is, whether or not it answers the above requirements as to differences resulting from differing methods or quantities in which such commodities are to such purchasers sold or delivered." H. R. Rep. No. 2287, *supra,* p. 10. (Italics added.)

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While in some cases costs relevant to the issue of discrimination under the Robinson-Patman Act may be computed class by class, the only costs relevant here are those computed store by store. The question of cost of delivery to all stores in the favored chain is irrelevant, because overhead costs applicable to a business as a unit have no bearing on any of the cost formulae presented by this record.

In the case of *Bowman Dairy Co.*, as the Court points out, the company charged all independents for customer service rendered by Bowman's deliverymen whether the independents availed themselves of the service or not. Bowman also charged independents for the time and expense of daily cash collections and for the costs of delays in collecting. These items were charged to independents even though it was not shown that their system of payment was always in cash, rather than by central billings, the system used by the chains.

In the *Borden* case an independent who purchased substantially larger quantities than the average chain store could not qualify for the discount the chain store obtained. This resulted because the independents were treated as one class, the chain stores as another class. As in *Bowman* the independents who did not make cash payments were treated as if they did; and they were not given the advantage which the chain stores enjoyed by reason of centralized billing even though they were on a credit basis.

What was said in *Champion Spark Plug Co.*, 50 F. T. C. 30, 43, is relevant here:

> "Respondent's cost of doing business undoubtedly varied as among its different customers. All of its selling expenses were not applicable on a proportionately equal basis to sales to all of its customers. However, in the absence of a sound basis for determining the actual cost of selling to particular cus-

> tomers, the sales to each customer must bear their proportionate share of the entire selling expense. A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination."

Where centralized purchasing for many stores takes place, the costs of dealing with the group as a class become relevant to the problem under § 2 (a). But where, as here, no centralized purchasing is involved, the store-by-store costs are the only criteria relevant to the § 2 (a) problem. Otherwise those with the most prestige get the largest discounts and the independent merchants are more and more forced to the wall.

The case was argued as if the grant of discounts was a natural right and that the Act should be construed so as to make the granting of them easy. The Act reflects, however, a purpose to control practices that lead to monopoly and an impoverishment of our middle class. I would therefore read it in a way that preserves as much of our traditional free enterprise as possible. Free enterprise is not free when monopoly power is used to breed more monopoly. That is the case here unless store-by-store costs are used as the criteria for discounts. This case is thus kin to that in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, where the lush treasury of a chain was used to bring a local bakery to its knees. Here, as there, the chains obtain a "competitive advantage" not as a result "of their skills or efficiency" but as a consequence of other influences.* There price-cutting was

*See *Curtiss Candy Co.*, 44 F. T. C. 237, 267–268, 274; *International Salt Co.*, 49 F. T. C. 138, 153–155, 157; *Champion Spark Plug Co.*, 50 F. T. C. 30, 43.

the weapon. Here it is the discount. Each leads to the same end—the aggrandizement of power by the chains and the ploughing under of the independents. The anti-trust laws, of which the Robinson-Patman Act is a part, were designed to avert such an inquest on free enterprise.

MR. JUSTICE HARLAN, dissenting.

The Court treats this case as if the District Court had introduced novel and disruptive principles into the law of "cost justification" under § 2 (a) of the Clayton Act.

Although I consider the respective cost studies much more adequate than the Court credits them with being, it is sufficient to say that, as I read the opinion below, the District Court judged their over-all adequacy in accordance with accepted principles of law in this field. The lower court indeed carefully refrained from giving unqualified approval to either set of cost studies, in substance merely holding (1) that the studies had been conscientiously prepared and prima facie appeared to justify generally the price discriminations arising from the appellees' discount practices (and more particularly to justify those specifically relied on by the Government as "trial" samples); and (2) that, in light of the long-drawn-out history of this litigation, the appropriate disposition was to deny injunctive relief, allowing the Government to bring to the attention of the Federal Trade Commission any other specific price differentials which it believed not justifiable under these or other cost studies.

This seems to me an eminently sensible and fair disposition of this stale litigation which has now been in the courts for nearly 12 years. I can see no point whatever in this Court sending the case back to the District Court for what will presumably amount to a third trial, especially when it is apparent that drastic changes in the

situation complained of by the Government have taken place since 1955.

Had what the record now reveals been fully appreciated at the time the Jurisdictional Statement was considered, a summary disposition of the case would have been called for.*

I would affirm.

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* The delays occasioned by the overcrowded docket of this Court as well as the nature of the issues in this litigation again point up the inadvisability of vesting sole appellate jurisdiction over this type of case in this Court. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 357 (dissenting and concurring opinion).

MANUAL ENTERPRISES, INC., ET AL. *v.* DAY, POSTMASTER GENERAL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 123. Argued February 26–27, 1962.—
Decided June 25, 1962.

After an administrative hearing, the Judicial Officer of the Post Office Department issued a ruling barring a shipment of petitioners' magazines from the mails under 18 U. S. C. § 1461, on the grounds that (1) they were themselves "obscene," and (2) they gave information as to where "obscene" matter could be obtained. The magazines consisted largely of photographs of nude, or nearly nude, male models and gave the name of each model and each photographer and the latter's address. They also contained a number of advertisements by independent photographers offering for sale photographs of nude men. The Judicial Officer found that the magazines (1) were composed primarily, if not exclusively, for homosexuals and had no literary, scientific or other merit; (2) would appeal to the "prurient interest" of such sexual deviates, but would not have any interest for sexually normal individuals; (3) are read almost entirely by homosexuals, and possibly a few adolescent males; and (4) would not ordinarily be bought by normal male adults. In a suit by petitioners, the District Court sustained the administrative ruling and denied injunctive relief. The Court of Appeals affirmed. *Held:* The judgment is reversed. Pp. 479–519.

110 U. S. App. D. C. 78, 289 F. 2d 455, reversed.

MR. JUSTICE HARLAN, joined by MR. JUSTICE STEWART, concluded that:

1. These magazines are not "obscene" within the meaning of 18 U. S. C. § 1461, because, taken as a whole, they cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency. Pp. 481–491.

2. The obscene-advertising proscription of § 1461 is not applicable unless the publisher *knew* that at least some of his advertisers

were offering to sell obscene material, and the evidence in this record is not sufficient to support a finding that petitioners had such knowledge. Pp. 491–495.

MR. JUSTICE BRENNAN, joined by THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS, concluded that 18 U. S. C. § 1461 does not authorize the Postmaster General to employ any administrative process of his own to close the mails to matter which, in his view, falls within the ban of that section. Pp. 495–519.

Stanley M. Dietz argued the cause for petitioners. With him on the brief was *Edward J. Lynch.*

J. William Doolittle argued the cause for respondent. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *David L. Rose.*

MR. JUSTICE HARLAN announced the judgment of the Court and an opinion in which MR. JUSTICE STEWART joins.

This case draws in question a ruling of the Post Office Department, sustained both by the District Court and the Court of Appeals, 110 U. S. App. D. C. 78, 289 F. 2d 455, barring from the mails a shipment of petitioners' magazines. That ruling was based on alternative determinations that the magazines (1) were themselves "obscene," and (2) gave information as to where obscene matter could be obtained, thus rendering them nonmailable under two separate provisions of 18 U. S. C. § 1461, known as the Comstock Act.[1] Certiorari was granted (368

[1] Section 1461 of 18 U. S. C. provides in part:

"Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—

. . . . . .

"Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of

U. S. 809) to consider the claim that this ruling was inconsistent with the proper interpretation and application of § 1461, and with principles established in two of this Court's prior decisions. *Roth* v. *United States,* 354 U. S. 476; *Smith* v. *California,* 361 U. S. 147.[2]

Petitioners are three corporations respectively engaged in publishing magazines titled MANual, Trim, and Grecian Guild Pictorial. They have offices at the same address in Washington, D. C., and a common president, one Herman L. Womack. The magazines consist largely of photographs of nude, or near-nude, male models and give the names of each model and the photographer,

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such mentioned matters, articles, or things may be obtained or made . . . .

. . . . .

"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

"Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

[2] Because of our view of the case, we need not reach petitioners' third contention that, as applied in this instance, these Post Office procedures amounted to an unconstitutional "prior restraint" on the publication of these magazines. The petitioner in this case has not questioned the Post Office Department's *general* authority under § 1461 to withhold these magazines from the mails *if* they are obscene. If that question, discussed in the opinion of MR. JUSTICE BRENNAN, *post,* p. 495, may still be deemed open in this Court, see *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 421–422 (Brandeis, J., dissenting); cf. *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, we do not think it should be decided except upon full-dress argument and briefing, which have not been afforded us here.

together with the address of the latter. They also contain a number of advertisements by independent photographers offering nudist photographs for sale.

On March 25, 1960, six parcels containing an aggregate of 405 copies of the three magazines, destined from Alexandria, Virginia, to Chicago, Illinois, were detained by the Alexandria postmaster, pending a ruling by his superiors at Washington as to whether the magazines were "nonmailable." After an evidentiary hearing before the Judicial Officer of the Post Office Department there ensued the administrative and court decisions now under review.

I.

On the issue of obscenity, as distinguished from unlawful advertising, the case comes to us with the following administrative findings, which are supported by substantial evidence and which we, and indeed the parties, for the most part, themselves, accept: (1) the magazines are not, as asserted by petitioners, physical culture or "bodybuilding" publications, but are composed primarily, if not exclusively, for homosexuals, and have no literary, scientific or other merit; [3] (2) they would appeal to the "prurient interest" of such sexual deviates, but would not have any interest for sexually normal individuals; and (3) the magazines are read almost entirely by homosexuals, and possibly a few adolescent males; the ordinary male adult would not normally buy them.

On these premises, the question whether these magazines are "obscene," as it was decided below and argued before us, was thought to depend solely on a determina-

[3] The Judicial Officer found that "the publisher has admitted that the magazines are knowingly published to appeal to the male homosexual group," and that "The publisher of the issues here involved has deliberately planned these publications so that they would appeal to the male homosexual audience . . . ."

tion as to the relevant "audience" in terms of which their "prurient interest" appeal should be judged. This view of the obscenity issue evidently stemmed from the belief that in *Roth* v. *United States*, 354 U. S. 476, 489, this Court established the following *single* test for determining whether challenged material is obscene: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (Footnote omitted.) On this basis the Court of Appeals, rejecting the petitioners' contention that the "prurient interest" appeal of the magazines should be judged in terms of their likely impact on the "average person," even though not a likely recipient of the magazines, held that the administrative finding respecting their impact on the "average homosexual" sufficed to establish the Government's case as to their obscenity.

We do not reach the question thus thought below to be dispositive on this aspect of the case. For we find lacking in these magazines an element which, no less than "prurient interest," is essential to a valid determination of obscenity under § 1461, and to which neither the Post Office Department nor the Court of Appeals addressed itself at all: These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazines cannot be deemed legally "obscene," and we need not consider the question of the proper "audience" by which their "prurient interest" appeal should be judged.

The words of § 1461, "obscene, lewd, lascivious, indecent, filthy or vile," connote something that is portrayed in a manner so offensive as to make it unacceptable under current community *mores*. While in common usage the

words have different shades of meaning,[4] the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex.[5] Although the statute condemns such material irrespective of the *effect* it may

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[4] The words of the statute are defined in Webster's New International Dictionary (unabridged, 2d ed., 1956) as follows:

obscene

"1. Offensive to taste; foul; loathsome; disgusting.

. . . . .

"2. a Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; as, *obscene* language, dances, images."

lewd

"4. Lustful; libidinous; lascivious; unchaste . . . .

"Syn. — Licentious, lecherous, dissolute, sensual; debauched, impure; obscene, salacious, pornographic."

lascivious

"1. Wanton; lewd; lustful.

. . . . .

"Syn. — Licentious, lecherous, libidinous, salacious."

indecent

"Not decent; specif.: a Unbecoming or unseemly; indecorous . . . .

"Syn. — Immodest, impure; gross, obscene."

filthy

"1. Defiled with filth, whether material or moral; nasty; disgustingly dirty; polluting; foul; impure; obscene.

. . . . .

"Syn. — Squalid, unclean, gross, licentious."

vile

"2. Morally contaminated; befouled by or as if by sin; morally base or impure; wicked; evil; sinful . . . .

"3. . . . unclean; filthy; repulsive; odious . . . .

. . . . .

"Syn. — Cheap (despicable), debased; depraved; corrupt, sordid, vicious; disgusting, loathsome, foul." To the same effect see Webster's New International Dictionary (unabridged, 3d ed. 1961).

[5] The first federal statute bearing on obscenity was the Tariff Act of 1842 which forbade the importation of "indecent and obscene" pic-

have upon those into whose hands it falls, the early case of *United States* v. *Bennett*, 24 Fed. Cas. 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth* v. *United States, supra,* at 489, "taken as a whole appeals to prurient interest." This "effect" element, originally cast in somewhat different language from that of *Roth* (see 354 U. S., at 487, 489), was taken into federal obscenity law from the leading English case of *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360, of which a distinguished Australian judge has given the following illuminating analysis:

> "As soon as one reflects that the word 'obscene,' as an ordinary English word, has nothing to do with corrupting or depraving susceptible people, and that it is used to describe things which are offensive to current standards of decency and not things which may induce to sinful thoughts, it becomes plain, I think, that Cockburn, C. J., in . . . *R.* v. *Hicklin* . . .

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torial matter and authorized confiscation. 5 Stat. 566–567. In 1865 the Congress passed the first Postal Act touching on the mailing of obscene matter, making it a crime to deposit an "obscene book . . . or other publication of a vulgar and indecent character" in the mails. 13 Stat. 507. The reenactment of the 1865 Act in the codification of the postal laws in 1872 did not change the several adjectives describing the objectionable matter. 17 Stat. 302. The Comstock Act, 17 Stat. 598, added the descriptive terms "lewd" and "lascivious" so that the proscription then included any "obscene, lewd, or lascivious book . . . or other publication of an indecent character," but this Court in *Swearingen* v. *United States,* 161 U. S. 446, 450, held that the words "obscene, lewd or lascivious" described a single offense. In 1909 the phrase "and every filthy" as well as the word "vile" were included in the provisions of the Comstock Act, 35 Stat. 1129. In 1955 the words were arranged in their present order. 69 Stat. 183. The Court of Appeals for the First Circuit noted that the words "indecent, filthy or vile" are limited in their meaning by the preceding words "obscene, lewd, lascivious," and that all have reference to matters of sex. *Flying Eagle Publications, Inc.* v. *United States,* 273 F. 2d 799, 803.

> was not propounding a logical definition of the word 'obscene,' but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel.[6] The tendency to deprave is not the characteristic which makes a publication obscene but is the characteristic which makes an obscene publication criminal. It is at once an essential element in the crime and the justification for the intervention of the common law. But it is not the whole and sole test of what constitutes an obscene libel. There is no obscene libel unless what is published is *both* offensive according to current standards of decency *and* calculated or likely to have the effect described in *R.* v. *Hicklin* . . . ."[7] *Regina* v. *Close,* [1948] Vict. L. R. 445, 463, Judgment of Fullagar, J. (Emphasis in original.)

The thoughtful studies of the American Law Institute reflect the same twofold concept of obscenity. Its earlier draft of a Model Penal Code contains the following definition of "obscene": "A thing is obscene if, considered as a whole, its predominant appeal is to

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[6] "Obscene libel" in English usage simply means obscene material, being derived from *libellus,* "little book." See St. John-Stevas, Obscenity and the Law, 24.

[7] The passage referred to in *Regina* v. *Hicklin* was the following: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." [1868] L. R. 3 Q. B., at 371.

The quotations from *Regina* v. *Close* and the *Hicklin* case are not intended to signify our approval of either the "tendency to deprave" or "sexual thoughts" test, but only to emphasize the two elements in the legal definition of "obscene."

prurient interest . . . *and* if it goes substantially beyond customary limits of candor in description or representation of such matters." A. L. I., Model Penal Code, Tent. Draft No. 6 (1957), § 207.10 (2). (Emphasis added.) The same organization's currently proposed definition reads: "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." A. L. I., Model Penal Code, Proposed Official Draft (May 4, 1962), § 251.4 (1). (Emphasis added.) [8]

Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under § 1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the "prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive.

The Court of Appeals was mistaken in considering that *Roth* made "prurient interest" appeal the sole test of obscenity.[9] Reading that case as dispensing with the

[8] This definition was approved by the Institute, as part of the "Proposed Official Draft," at its annual meeting in Washington, D. C., in May 1962.

[9] It is also evident that the Judicial Officer of the Post Office Department and its counsel entertained the same mistaken view of *Roth*. The Report of the Judicial Officer did not address itself directly to the inherent indecency aspect of the magazines, except to the extent that such factor was tangentially involved in the findings already summarized (*supra*, p. 481). The same is true of the expert testimony adduced by government counsel at the administrative hearing.

requisite of patently offensive portrayal would be not only inconsistent with § 1461 and its common-law background, but out of keeping with *Roth's* evident purpose to tighten obscenity standards. The Court there both rejected the "isolated excerpt" and "particularly susceptible persons" tests of the *Hicklin* case, 354 U. S., at 488–489, and was at pains to point out that not all portrayals of sex could be reached by obscenity laws but only those treating that subject "in a manner appealing to prurient interest." 354 U. S., at 487. That, of course, was but a compendious way of embracing in the obscenity standard *both* the concept of patent offensiveness, manifested by the terms of § 1461 itself, and the element of the likely corruptive effect of the challenged material, brought into federal law via *Regina* v. *Hicklin*.

To consider that the "obscenity" exception in "the area of constitutionally protected speech or press," *Roth*, at 485, does not require any determination as to the patent offensiveness *vel non* of the material itself might well put the American public in jeopardy of being denied access to many worthwhile works in literature, science, or art. For one would not have to travel far even among the acknowledged masterpieces in any of these fields to find works whose "dominant theme" might, not beyond reason, be claimed to appeal to the "prurient interest" of the reader or observer. We decline to attribute to Congress any such quixotic and deadening purpose as would bar from the mails all material, not patently offensive, which stimulates impure desires relating to sex. Indeed such a construction of § 1461 would doubtless encounter constitutional barriers. *Roth*, at 487–489. Consequently we consider the power exercised by Congress in enacting § 1461 as no more embracing than the interdiction of "obscenity" as it had theretofore been understood. It is only material whose indecency is self-demonstrating *and* which, from the standpoint of its effect, may be said

predominantly to appeal to the prurient interest that Congress has chosen to bar from the mails by the force of § 1461.

We come then to what we consider the dispositive question on this phase of the case. Are these magazines offensive on their face? Whether this question be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 114–115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations. That issue, involving factual matters entangled in a constitutional claim, see *Grove Press, Inc.*, v. *Christenberry*, 276 F. 2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves.

There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue [10] which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. *Butler* v. *Michigan*, 352 U. S. 380.

As regards the standard for judging the element of "indecency," the *Roth* case gives little guidance beyond

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[10] The 1958 amendments to 18 U. S. C. § 1461, 72 Stat. 962, authorizing criminal prosecution at the place of delivery evince no purpose to make the standard less than national.

indicating that the standard is a constitutional one which, as with "prurient interest," requires taking the challenged material "as a whole." *Roth*, at 489. Being ultimately concerned only with the question whether the First and Fourteenth Amendments protect material that is admittedly obscene,[11] the Court there had no occasion to explore the application of a particular obscenity standard. At least one important state court and some authoritative commentators have considered *Roth* and subsequent cases [12] to indicate that only "hard-core" pornography can constitutionally be reached under this or similar state obscenity statutes. See *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578, 175 N. E. 2d 681; Lockhart and McClure, *supra*, at 58–60. Whether "hard-core" pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency.

We cannot accept in full the Government's description of these magazines which, contrary to *Roth* (354 U. S., at 488–489), tends to emphasize and in some respects overdraw certain features in several of the photographs, at the expense of what the magazines fairly taken as a whole depict.[13] Our own independent examination of

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[11] No issue was presented in *Roth* as to the obscenity of any of the materials involved. 354 U. S., at 481, n. 8.

[12] See cases cited, *infra*, p. 490.

[13] "The magazines contained little textual material, with pictures of male models dominating almost every page . . . . The typical page consisted of a photograph, with the name of the model and the photographer and occasional references to the model's age (usually under 26), color of eyes, physical dimensions and occupation. The magazines contained little, either in text or pictures, that could be

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the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them "obscene." Divorced from their "prurient interest" appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene. See *Parmelee* v. *United States,* 72 App. D. C. 203, 206–208, 113 F. 2d 729, 732–734; *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372; *Mounce* v. *United States,* 355 U. S. 180. Were we to hold that these magazines, although they do not transcend the prevailing bounds of decency, may be denied access to the mails by such undifferentiated legislation as that before us, we would be ignoring the admonition that "the door . . . into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened

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considered as relating in any way to weight lifting, muscle building or physical culture . . . .

"Many of the photographs were of nude male models, usually posed with some object in front of their genitals . . . ; a number were of nude or partially nude males with emphasis on their bare buttocks . . . . Although none of the pictures directly exposed the model's genitals, some showed his pubic hair and others suggested what appeared to be a semi-erect penis . . . ; others showed male models reclining with their legs (and sometimes their arms as well) spread wide apart . . . . Many of the pictures showed models wearing only loin cloths, 'V gowns,' or posing straps . . . ; some showed the model apparently removing his clothing . . . . Two of the magazines had pictures of pairs of models posed together suggestively . . . .

"Each of the magazines contained photographs of models with swords or other long pointed objects . . . . The magazines also contained photographs of virtually nude models wearing only shoes, boots, helmets or leather jackets . . . . There were also pictures of models posed with chains or of one model beating another while a third held his face in his hands as if weeping . . . ."

only the slightest crack necessary to prevent encroachment upon more important interests" (footnote omitted). *Roth*, at 488.[14]

We conclude that the administrative ruling respecting nonmailability is improvident insofar as it depends on a determination that these magazines are obscene.

II.

There remains the question of the advertising. It is not contended that the petitioners held themselves out as purveyors of obscene material, or that the advertisements, as distinguished from the other contents of the magazines, were obscene on their own account. The advertisements were all by independent third-party photographers. And, neither with respect to the advertisements nor the magazines themselves, do we understand the Government to suggest that the "advertising" provisions of § 1461 are violated if the mailed material merely "gives the leer that promises the customer some obscene pictures." *United States* v. *Hornick*, 229 F. 2d 120, 121. Such an approach to the statute could not withstand the underlying precepts of *Roth*. See *Poss* v. *Christenberry*, 179 F. Supp. 411, 415; cf. *United States* v. *Schillaci*, 166 F. Supp. 303, 306. The claim on this branch of the case rests, then, on the fact that some of the third-party advertisers were found in possession of what undoubtedly may be regarded as "hard-core" photographs,[15] and that postal

[14] Since Congress has sought to bar from the mails only material that is "obscene, lewd, lascivious, indecent, filthy or vile," and it is within this statutory framework that we must judge the materials before us, we need not consider whether these magazines could constitutionally be reached under "a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger." *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

[15] A number of such photographs were seized by the police, possessing search or arrest warrants, but knowledge that these advertisers were selling, or would sell, such photographs was never brought home to any of these petitioners.

officials, although not obtaining the names of the advertisers from the lists in petitioners' magazines, received somewhat less offensive material through the mails from certain studios which were advertising in petitioners' magazines.

A question of law must first be dealt with. Should the "obscene-advertising" proscription of § 1461 be construed as not requiring proof that the publisher *knew* that at least some of his advertisers were offering to sell obscene material? In other words, although the criminal provisions of § 1461 do require *scienter* (note 1, *supra*), can the Post Office Department in civil proceedings under that section escape with a lesser burden of proof? We are constrained to a negative answer. *First,* Congress has required *scienter* in respect of one indicted for mailing material proscribed by the statute. In the constitutional climate in which this statute finds itself, we should hesitate to attribute to Congress a purpose to render a publisher civilly responsible for the innocuous advertisements of the materials of others, in the absence of any showing that he knew that the character of such materials was offensive. And with no express grant of authority to the Post Office Department to keep obscene matter from the mails (see note 2, *supra*), we should be slow to accept the suggestion that an element of proof expressly required in a criminal proceeding may be omitted in an altogether parallel civil proceeding. *Second,* this Court's ground of decision in *Smith* v. *California,* 361 U. S. 147, indicates that a substantial constitutional question would arise were we to construe § 1461 as not requiring proof of *scienter* in civil proceedings. For the power of the Post Office to bar a magazine from the mails, if exercised without proof of the publisher's knowledge of the character of the advertisements included in the magazine, would as effectively "impose a severe limitation on the public's

access to constitutionally protected matter," 361 U. S., at 153, as would a state obscenity statute which makes criminal the possession of obscene material without proof of *scienter*. Since publishers cannot practicably be expected to investigate each of their advertisers, and since the economic consequences of an order barring even a single issue of a periodical from the mails might entail heavy financial sacrifice, a magazine publisher might refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department. This would deprive such materials, which might otherwise be entitled to constitutional protection, of a legitimate and recognized avenue of access to the public. To be sure, the Court found it unnecessary in *Smith* to delineate the scope of *scienter* which would satisfy the Fourteenth Amendment. Yet it may safely be said that a federal statute which, as we construe it, requires the presence of that element is not satisfied, as the Government suggests it might be, merely by showing that a defendant did not make a "good faith effort" to ascertain the character of his advertiser's materials.

On these premises we turn to the record in this case. Although postal officials had informed petitioners' president, Womack, that their Department was *prosecuting* several of his advertisers for sending obscene matter through the mails, there is no evidence that any of this material was shown to him. He thus was afforded no opportunity to judge for himself as to its alleged obscenity. Contrariwise, one of the government witnesses at the administrative hearing admitted that the petitioners had deleted the advertisements of several photographic studios after being informed by the Post Office that the proprietors had been *convicted* of mailing obscene mate-

rial.[16] The record reveals that none of the postal officials who received allegedly obscene matter from some of the advertisers obtained their names from petitioners' magazines; this material was received as a result of independent test checks. Nor on the record before us can petitioners be linked with the material seized by the police. Note 15, *supra*. The only such asserted connection—that "hard core" matter was seized at the studio of one of petitioners' advertisers—falls short of an adequate showing that petitioners knew that the advertiser was offering for sale obscene matter. Womack's own conviction for sending obscene material through the mails, *Womack* v. *United States*, 111 U. S. App. D. C. 8, 294 F. 2d 204, is remote from proof of like conduct on the part of the advertisers. At that time he was acting as president of another studio; the vendee of the material, while an advertiser in petitioners' magazines, had closed his own studio before the present issues were published. Finally, the general testimony by one postal inspector to the effect that in his experience advertisers of this character, after first leading their customers on with borderline material, usually followed up with "hard-core" matter, can hardly be deemed of probative significance on the issue at hand.

At best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same character, and with the same purposes, as those reflected

[16] Grecian Guild Pictorial carried a notice that it "does not knowingly use the work of any studio which takes or sells nude, undraped front or side view photographs. The photographers listed above do not offer such photographs." To be sure this magazine, as did the others, also carried a notation that the publisher was familiar with the work of the advertisers and urged the reader to support them; but this cannot well be taken as an admission of knowledge that the advertisers' works were obscene.

in their own magazines. This is not enough to satisfy the Government's burden of proof on this score.[17]

In conclusion, nothing in this opinion of course remotely implies approval of the type of magazines published by these petitioners, still less of the sordid motives which prompted their publication. All we decide is that on this record these particular magazines are not subject to repression under § 1461.

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in the reversal.

I agree that the judgment below must be reversed, though for a reason different from my Brother HARLAN's. This is the first occasion on which the Court has given

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[17] We do not think it would be appropriate at this late stage to remand the case for further proceedings on the issue of *scienter*. Although suggesting that "[it] is arguable" that *scienter* is not a necessary element under this part of the statute, the Government undertakes to defend this aspect of the judgment primarily on the premise that it was. The record shows that at the administrative hearing government counsel sought to fasten the petitioners with knowledge that the third-party advertisers were selling "obscene" material. The Judicial Officer indeed rejected the petitioners' proposed findings that "the publishers of each of the magazines in evidence . . . had no personal knowledge of the material sold by the advertisers . . . ." To be sure, the record does not disclose whether this was because "knowledge" was deemed proved rather than that such element was not considered relevant. But on the cross motions for summary judgment, based upon the administrative record, the Government did not undertake to controvert petitioners' allegations that *scienter* was a necessary element under this part of the statute.

plenary review [1] to a Post Office Department order holding matter "nonmailable" because obscene.

Petitioners, publishers of certain magazines, employ the mails in the distribution of about half of their claimed circulation of 25,000. On March 25, 1960, petitioners deposited 405 copies of their publications for transmission as second class mail from Alexandria, Virginia, to Chicago. However, the Alexandria postmaster, acting, apparently without notice to petitioners, on his belief that the magazines might be obscene and therefore "nonmailable" under 18 U. S. C. § 1461, withheld delivery and forwarded samples to the General Counsel of the Post Office Department. On April 5 and 7 that official notified petitioners not only that the magazines were being withheld from delivery because of his opinion that they were nonmailable, but also that no formal hearing would be held since an insufficient monetary value was involved. Shortly thereafter, on April 11, 1960, petitioners requested a Post Office hearing, and also sought injunctive relief in the District Court for the District of Columbia against this stoppage of their mailing. On the same day the Post Office Judicial Officer reversed the General Counsel and ordered a hearing, and thereafter the District Court refused temporary relief. On April 21, after pleadings had been filed, the hearing was begun before the Judicial Officer. On April 25 petitioners' injunction suit was dismissed on the condition that they might seek further relief if final administrative action was not forthcoming by April 28. On April 28, one month and three days after the mailing, the Judicial Officer handed down his opinion holding the magazines obscene and nonmailable, thus opening petitioners' way into court.

On May 13, petitioners filed the complaint now before us, alleging that the magazines were not obscene, that

[1] *One, Inc.*, v. *Olesen*, 355 U. S. 371, and *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372, were decided summarily without argument.

respondent's action in withholding them from the mails was "unlawful and inequitable . . . calculated . . . to censor and harass plaintiffs and . . . a prior restraint designed to deprive the plaintiffs of their rights under the First Amendment . . . ," and requesting temporary and permanent injunctive relief. Petitioners then moved for summary judgment, arguing, *inter alia*, that "the Post Office Department held a time-consuming hearing, the product of which was an Order contrary to the established law of the United States . . . . This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing . . . is to delay action of this Court. . . . Plaintiffs assert that the Post Office has conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substantive problems of determining whether or not the magazines are obscene. . . . Further, plaintiffs argue that the entire civil procedure followed by the Post Office based upon a criminal statute raises doubts of constitutionality." Respondent, too, moved for summary judgment. His motion was granted and the complaint dismissed without opinion. The Court of Appeals affirmed, holding the magazines obscene.

In addition to the question whether the particular matter is obscene, the Post Office order raises insistent questions about the validity of the whole procedure which gave rise to it, vital to the orderly development of this body of law and its administration. We risk erosion of First Amendment liberties unless we train our vigilance upon the methods whereby obscenity is condemned no less than upon the standards whereby it is judged. *Marcus* v. *Search Warrant*, 367 U. S. 717; *Kingsley Books, Inc.*, v. *Brown*, 354 U. S. 436; see also *Smith* v. *California*, 361 U. S. 147. Questions of procedural safeguards loom large in the wake of an order such as the one before us. Among them are: (a) whether Congress can close the

mails to obscenity by any means other than prosecution of its sender; (b) whether Congress, if it can authorize exclusion of mail, can provide that obscenity be determined in the first instance in any forum except a court, and (c) whether, even if Congress could so authorize administrative censorship, it has in fact conferred upon postal authorities any power to exclude matter from the mails upon their determination of its obscene character.[2]

Lower courts and judges have been troubled by these questions,[3] but this Court has not had occasion to decide them. At least question (c) is before us now.[4] It surpasses in general significance even the important issue of the standards for judging this material's "mailability." Moreover, dealing with the case on this ground involves less constitutional difficulty than inheres in others. The conclusion that the Postmaster General is acting *ultra vires* because Congress has not granted the power which

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[2] There would also be the question, if (a), (b) and (c) were answered affirmatively, of the validity of the particular procedures that the Post Office has employed.

[3] See, *e. g.*, *Grove Press, Inc.*, v. *Christenberry*, 175 F. Supp. 488, 495, and 276 F. 2d 433, 435; *Sunshine Book Co.* v. *Summerfield*, 101 U. S. App. D. C. 358, 364–367, 249 F. 2d 114, 120–123 (dissenting opinion), reversed, see *supra*, n. 1. And cf. *Roth* v. *Goldman*, 172 F. 2d 788, 794–795 (concurring opinion). Compare *Stanard* v. *Olesen*, 74 S. Ct. 768 (opinion of MR. JUSTICE DOUGLAS), *Olesen* v. *Stanard*, 227 F. 2d 785; *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. 169, 221 F. 2d 42.

[4] The Government argues that petitioners "complain generally of 'an unconstitutional prior restraint,' . . . without specifying [where] the asserted vice lies . . . ." Insofar as petitioners challenge the constitutionality of § 1461 if read to impose civil restraints, their suit would be within the requirements for convening a three-judge court under 28 U. S. C. § 2282, and therefore that claim is not here. But insofar as their attack is grounded upon a claim that § 1461 is not to be construed as granting censorial power to the Post Office, § 2282 does not apply.

he here asserts, while greatly influenced by constitutional doubts, does not require a decision as to whether any establishment of administrative censorship could be constitutional. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146; *Kent* v. *Dulles*, 357 U. S. 116.[5]

Mr. Justice Holmes has said: "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man." *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 437 (dissenting opinion).

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[5] My Brother HARLAN states that no question is raised as to the Post Office Department's general authority under 18 U. S. C. § 1461 to withhold obscene matter from the mails. The Government asserts only that at the administrative level the petitioners made no objection to the procedure. The Government does not suggest that the challenge to the Post Office's power to act at all had to be made before the administrative body. That challenge presents a jurisdictional question and is open to the petitioners even if not initially asserted in the agency proceeding. See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38. And although perhaps not artfully, the petitioners did challenge the authority of the Post Office in the District Court. In their motion for summary judgment petitioners stated: "[P]laintiffs argue that the entire civil procedure followed by the Post Office based upon a criminal statute raises doubts of constitutionality. The fragile foundation on which the Post Office action rests must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. . . . There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations." The Court of Appeals did not discuss the issue, perhaps because it had held in *Sunshine Book Co.* v. *Summerfield*, *supra*, n. 3, that the questioned authority exists; the Government does not suggest that petitioners failed to make their argument there. And in this Court, petitioners continue their attack and the Government, without reservation, fully defends against it.

Whether Congress, by its enactment or amendment of 18 U. S. C. § 1461 (a part of the Criminal Code), has authorized the Postmaster General to censor obscenity, is our precise question. The Government relies upon no other provision to support the constitutionally questionable power of administrative censorship of this material. That power is inferred from the declaration that every item proscribed in § 1461 is "nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier." Even granting that these words on their face permit a construction allowing the Post Office the power it asserts, their use in a criminal statute, their legislative history, and the contrast with the words and history of other provisions dealing with similar problems, raise the most serious doubt that so important and sensitive a power was granted by so perfunctory a provision. The area of obscenity is honeycombed with hazards for First Amendment guaranties, and the grave constitutional questions which would be raised by the grant of such a power should not be decided when the relevant materials are so ambiguous as to whether any such grant exists.

I.

The origin of § 1461 is briefly told.[6] It was the tag end of a bill drawn in 1865 to meet Post Office requests

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[6] There is no need to consider here the history before 1865, which was highlighted by the rejection by Congress in 1836, largely on constitutional grounds, of President Jackson's request for legislation to suppress mail distribution of "incendiary" abolitionist literature. See Rogers, The Postal Power of Congress (1916); Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. 703 (1938). The 1865 Senate debates referred to such action as the kind for which power should be withheld. Cong. Globe, 38th Cong., 2d Sess. 661 (1865). The Post Office occasionally seized allegedly treasonable

for various administrative changes. Its first version read:

> "That no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct. And any person or persons who shall deposit or cause to be deposited in any post office or branch post office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor, and, being duly convicted thereof, shall, for every such offense, be fined not more than $500, or imprisoned not more than one year, or both, according to the circumstances and aggravations of the offense."

In offering this proposal, Chairman Collamer of the Senate Post Office Committee took pains to point out that it "may be liable to some objection. . . . I am not perhaps entirely satisfied with it," and Senator Reverdy

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newspapers despite its lack of authority. See H. R. Rep. No. 51, 37th Cong., 3d Sess., pp. 3, 10 (1863).

The only noncriminal procedure authorized against obscene material before 1865 was a judicial proceeding for imported material's forfeiture. 5 Stat. 566; see *United States* v. *Three Cases of Toys*, 28 Fed. Cas. 112, No. 16,499; *Anonymous*, 1 Fed. Cas. 1024, No. 470. For a comprehensive discussion of the history and practice of censorship in the Post Office and Bureau of Customs, see Paul and Schwartz, Federal Censorship: Obscenity in the Mail (1961), and Paul, The Post Office and Non-Mailability of Obscenity: An Historical Note, 8 U. C. L. A. L. Rev. 44 (1961).

Johnson, concerned about postmasters breaking seals, immediately took up Chairman Collamer's suggestion that only the penal provision be adopted. Chairman Collamer, agreeing that the nonpenal clause "might be made a precedent for undertaking to give [a postmaster] a sort of censorship over the mails," said he would be as happy if it were dropped. Senator Johnson then moved to strike it: "[I]t would be establishing a very bad precedent to give authority to postmasters to take anything out of the mail." He acknowledged that much material is sent uncovered, but thought the penal provision sufficient to meet the evil. However, Senator Sherman observed:

> "I would much prefer, if the Senator would be satisfied, with simply striking out the second clause of the first [sentence]. I think the prohibition against publications of this character going into the mails ought to stand. We are well aware that many of these publications are sent all over the country from the city of New York with the names of the parties sending them on the backs, so that the postmasters without opening the mail matter may know that it is offensive matter, indecent and improper to be carried in the public mails. I think, therefore, the legislative prohibition against carrying such matter when it is known to the postmasters should be left. Probably the second clause allowing him to open mail matter should be struck out . . . ."

Senator Johnson acquiesced and the bill was then passed, reading:

> "That no obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States; any person or persons . . . ." Cong. Globe, 38th Cong., 2d Sess. 660–661 (1865); 13 Stat. 507.

There are two possible constructions of § 1461 on the basis of this brief Senate discussion. One possibility is that short of breaking seals,[7] the postmasters could remove matter which they thought from its face or the name of its sender to be obscene. The second construction is that postmasters could remove matter but only to turn it over to the appropriate authorities as the proposed subject of a criminal prosecution—and also of course after that material had been determined, in a criminal trial of its sender, to be obscene. Support for this second construction is found not only in the brief 1865 Senate consideration itself but also in an 1888 statute amending § 1461, and enacting a section banning material with obscene matter on its face and—unlike § 1461—explicitly providing that it "shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe." [8]

The 1865 Senate discussion is not unambiguous, but I cannot suppose that Senator Johnson—who had already noted his awareness that much obscene material was discoverable without breaking seals, and even so, his determined opposition to its being stopped—would have accepted Senator Sherman's suggestion had he understood it to mean more than that the Post Office could stop obviously questionable matter for the purpose of transmitting it to prosecuting authorities, could stop matter already held obscene if it were sent again, and could investigate matter sent by persons previously convicted and, if the matter were found violative, could present it to the prosecuting authorities. I believe this is the correct

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[7] Congress in 1865 was undoubtedly against any power in the Post Office to break seals (see Cong. Globe, 38th Cong., 2d Sess. 660–661), and 23 years later made this explicit as to first class mail. 25 Stat. 496–497. But even that was a prohibition "out of abundant caution" and was not intended to imply any power to open mail of other classes. See 19 Cong. Rec. 8189 (1888).

[8] 25 Stat. 496, now 18 U. S. C. § 1463.

construction of the 1865 enactment. But at least it is arguably correct, and necessary if we are to avoid the section's probable constitutional infirmity[9] (see *Near* v. *Minnesota*, 283 U. S. 697; *Summerfield* v. *Sunshine Book Co.*, 95 U. S. App. D. C. 169, 221 F. 2d 42) if construed as a provision allowing the Postmaster General to exclude all matter sent by a person who had previously sent violative matter. Such an exclusion by attaint could not be justified by the "hoary dogma . . . that the use of the mails is a privilege on which the Government may impose such conditions as it chooses, [for that] has long since evaporated." *Roth* v. *United States*, 354 U. S. 476, 504 (dissenting opinion); *Hannegan* v. *Esquire, Inc.*, 327 U. S., at 156; *Speiser* v. *Randall*, 357 U. S. 513, 518.

Subsequent developments concerning the removal of matter from the mails reveal a nearly contemporaneous strong distaste for and awareness of constitutional doubts about nonjudicial censorship, such as reflects meaningfully on the ambiguity surrounding § 1461's enactment. That ambiguity has persisted throughout § 1461's history of amendment, reconsideration, and codification. In the concurrent history of Congress' handling of related problems, there has been in each instance either a clear grant of power to the Postmaster General or, for matters as inextricably intertwined with the First Amendment as obscenity, a provision for judicial rather than administrative process. Nothing is found to suggest that one should resolve the ambiguity in 1865 to find a grant of the power of administrative censorship. Compare *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 311.

In 1868, in considering a provision making it unlawful to deposit letters or circulars concerning lotteries, House Conferees struck a Senate proposal which would have

[9] See *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 423, 429–430 (Brandeis, J., dissenting).

authorized postmasters to remove from the mail and deposit in dead letter offices any letters or circulars thought to concern lotteries. House Postal Committee Chairman Farnsworth explained "We thought that was a dangerous power to confer upon postmasters, and therefore we have stricken it out. That section provides that it shall be unlawful to deposit in the mails . . . which we thought would be a wise provision. But we thought it would not be wise to give postmasters this extraordinary power to be exercised upon a mere suspicion." Cong. Globe, 40th Cong., 2d Sess. 4412 (1868). Opinions of the Attorney General advising as to the postmasters' authority under this lottery provision emphasized the necessity for explicit legislative authorization to warrant removal of material from the mails. Those opinions cited examples of provisions containing such express authorization but, significantly, did not include § 1461—an important omission in the light of the observation of the Attorney General that aside from the examples he gave "[i]f there are other provisions permitting a detention of letters by a postmaster, they have escaped my attention. It is believed that, at least, there are no others affecting the subject of the present inquiry." Furthermore, in describing the authorizations he did find, the Attorney General said: "It will be seen that none of these authorize what can properly be called a 'seizure' of any suspected letters by a postmaster, because, probably, he is not deemed the proper functionary to bring to trial and punishment those violating the postal laws." [10]

In 1872, § 1461 was amended as part of a codification of postal legislation. The amendment added a proscription against the mailing of "any letter upon the envelope of which, or postal card upon which scurrilous epithets

[10] 16 Op. Atty. Gen. 5, 6 (1878); 12 *id.*, 538 (1868); and see 12 *id.*, 399, 401 (1868).

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may have been written or printed, or disloyal devices printed or engraved . . . ." 17 Stat. 302.[11] The section was further revised when the Comstock Law was enacted in 1873. 17 Stat. 598. That statute established penalties for dealing in or in any way publishing obscenity or any article of an immoral nature in areas under federal jurisdiction, expanded the list of items not to be mailed to include matter intended to aid the procuring of abortion, and banned the importation of all such items. When the bill came to the floor, Senator Casserly objected to the provision allowing customs officers to seize prohibited items: "I do not know whether it can be left to officers of the custom-house to determine with safety what kind of literature or what sort of matter is to be admitted." Cong. Globe, 42d Cong., 3d Sess. 1436 (1873). The bill was accordingly changed to authorize customs officers simply to detain the items, and then proceed in a federal court to condemn them, if the federal judge were satisfied that they must be condemned. *Id.*, at 1525. There is no suggestion that customs officers were thought to be less trustworthy than postal officers;[12] this insistence upon judicial proceedings shows plainly the congressional aversion to administrative censorship.

The Comstock bill received but scant and hasty consideration.[13] As passed, its language was susceptible of a reading which would fail to penalize the mailing of

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[11] There was also a provision that any material "which may be seized or detained for violation of law shall be returned to the owner or sender of the same, or otherwise disposed of as the Postmaster-General may direct," 17 Stat. 323, but that only states what may be done with material which may be seized or detained, and our question is whether obscene material—except in the narrow circumstances already described—may be seized or detained at all. Compare pp. 511–512, *infra*.

[12] But see Casserly's second statement, *id.*, at 1436, which was a misunderstanding of the bill.

[13] See Paul, *supra*, n. 6, at 51–57.

obscene or indecent *literature*, and reach only actual abortifacients. Closing this inadvertent gap was the sole purpose [14] of an 1876 amendment, 19 Stat. 90, which made several language changes; among them, the substitution of the words of which the Government makes so much—"declared to be non-mailable matter, [which] shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier"—for the more cursory "[which] shall [not] be carried in the mail." Moreover, the 1876 discussion evinces the understanding that the only obscene materials removable by the Post Office were those which were to be submitted as, or which already had been, the subject of a criminal prosecution. The manager of the amendment assured the House: "Nor, sir, does this bill give any right to any postmaster to open or to interfere with anybody's mail. It is like anything else, before you can convict, you must offer and make proof." During the debate a different speaker said: "Whenever a jury in any locality in the country shall find that a paper contains matter which may be devoted to a purpose which they deem immoral—not only indecent, but immoral—the jury may convict the man who sends

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[14] The bill's manager in the House said: "[T]he proposed bill in no wise changes the law as it now is except to provide a penalty for the circulation of obscene literature. By an oversight in drafting the original section the penalty applies only to the disposition of articles circulated or sold for the purpose of procuring abortion or preventing conception. Already this obscene class of matter spoken of in the other portion of the section is prohibited from passing through the mails, but no penalty is provided. . . . [I]t in no way changes the section as it now is. It makes nothing non-mailable that is not now non-mailable. It merely provides a penalty. . . ." 4 Cong. Rec. 695 (1876).

"Section [1461] is perfected by the bill so as to provide a complete penalty for the mailing of all kinds of matter therein prohibited to pass through the mails." 4 Cong. Rec. 3656. The Senate did not discuss this change. See 4 Cong. Rec. 4261–4264.

the paper or the man who receives it by mail, and the postmaster is authorized to exclude that newspaper from the mail." A third speaker, in urging that the word "scurrilous" be removed, warned: "I do not object to the purification of the mails, but I would like the committee when they reconsider this bill not to go too far in giving postmasters discretion." Another Congressman feared that the severity of the penalties would make the law a dead letter, because judges and juries would be unwilling to convict. Thus the tenor of the entire debate reflected the premise that § 1461 had only a criminal application. No one suggested that it also authorized administrative censorship. 4 Cong. Rec. 695–696.[15] And see 8 Cong. Rec. 697 (1879).

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[15] Discussion in the Senate included the first reference to the problem of standards of obscenity—it was hardly such as to afford guidelines for administrative action:

"Mr. MORTON. Mr. President, in prohibiting the transmission of any matter through the mails there ought to be great care used and it ought to be particularly described and defined. All of that which is described in the beginning of the first section of this bill is eminently proper to prohibit from being transmitted through the mails; but there is a part of that section that I think is vague and susceptible of abuse. It prohibits the transmission through the mail of 'every article or thing intended or adapted for any indecent or immoral use.' What is an 'immoral use?' That question may be subject to very different opinions. The word 'obscene' is well defined; we can understand what that means; but when you prohibit everything that is for an immoral use, there would be wide differences of opinion on that point.

"Mr. CONKLING. The same words are in the law now.

"Mr. MORTON. That may be. I remember a time when certain newspapers and pamphlets were prohibited from going through the mails in certain States, because they were held to be of an immoral and seditious character—of 'an incendiary character,' as my friend from Ohio [Mr. SHERMAN] suggests. Public opinion has changed upon that point. But when we come to prohibit the transmission of any matter through the mails, we ought to understand pretty well what it is. There are many things that a portion of our people would con-

Especially significant in pointing up the purely penal application of § 1461 are the legislative events of 1888. An amendment of but a few months' duration changed the law on such postal crimes as counterfeiting money orders. It included a provision penalizing the mailing of any matter upon the envelope or outside cover of which was indecent, scurrilous, threatening, etc., language.[16] The provision was promptly amended in the same session because "there was a suspicion that an implied power was given to postmasters to open letters. Of course there was no such intention, and this [new] bill eliminates that objectionable feature . . . ." 19 Cong. Rec. 8189.[17]

But even more significantly, the new enactment transferred to a new section, § 1463, 25 Stat. 496, the ban of § 1461 which, in the 1876 version (19 Stat. 90), had reached "every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed"; and § 1463, instead of merely

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sider immoral that other portions would consider entirely moral. Some people might consider a pack of cards highly immoral; others might think they were entirely proper. Many other things might be enumerated." 4 Cong. Rec. 4263.

[16] "And all matter otherwise mailable by law upon the envelope or outside cover or wrapper of which, or postal card, upon which indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another, may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit . . . ." 25 Stat. 188.

The proscription of scurrilous epithets had been part of § 1461 as amended in 1873, 17 Stat. 599, but it was removed in 1876 when the word's breadth and vagueness were objected to. Its reenactment was largely aimed at a "blackmailing" process for the collection of debts. 19 Cong. Rec. 2206, 6734, 7662 (1888).

[17] But see also *id.*, at 6733–6734.

declaring that the listed matter was nonmailable and was not to be conveyed or delivered, provided that those items *"shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe . . . ."* It is strange, I think, that § 1461—amended at the same time as § 1463 was enacted—was not amended also to include an explicit provision for withdrawal from the mails, if authority for withdrawal had been Congress' intention. But Congress did not contemplate any general administrative censorship of obscenity. The House discussion expressed the agreement that besides the power to punish, there should be no more than the most limited Post Office power to stop mail—and § 1463 states that limitation; and the Senate debate, focusing almost entirely upon how severe the penalties should be, reinforced the restrictions upon the postmasters and underlined that § 1461 is exclusively penal. See 19 Cong. Rec. 7660–7662, 8189.

The last congressional dealing with § 1461 which is pertinent to our inquiry occurred in 1909, when again that section was amended, this time to bar more abortifacients and "every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing." [18] Though committee reports are unenlightening, the House discussion makes plain that the changes were intended to reverse the limitations stated in *Swearingen* v. *United States,* 161 U. S. 446, that the statute applied only to "that form of immorality which has relation to sexual impurity," and that its words had "the same meaning as is given them at common law in prosecutions for obscene libel." 161 U. S., at 451; 42 Cong. Rec. 995–999, 43 Cong. Rec. 283–284.[19] The two brief House discussions suggest that there were members who did believe that

[18] 35 Stat. 1129.

[19] See *United States* v. *Limehouse,* 285 U. S. 424.

the Post Office had some power to remove obscene mail, even apart from presenting it for criminal prosecution; it was analogized to fraudulent matter. But nothing characterizes the discussion so much as its ambiguity, and its concern lest the Post Office acquire powers whose exercise would amount to censorship. See 42 Cong. Rec. 995–998. And see 101 Cong. Rec. 3804, 7798, 8241–8242 (1955).

II.

Section 1463 is not the only statute which goes further than § 1461 towards authorizing Post Office censorship. Five other criminal statutes prohibiting the introduction of various matter into the mails either contain within themselves or have direct counterparts in the postal laws which contain explicit authorizations to the Postmaster General to remove or return such matter.[20] In sharp

[20] (1) 18 U. S. C. § 1718, the criminal provision against mailing of matter libelous on its face, explicitly empowers the Postmaster General to make regulations governing its withdrawal from the mails; (2) 18 U. S. C. §§ 1341 and 1302, the criminal mail fraud and lottery provisions, have a matching section in the postal laws empowering the Postmaster General, upon evidence satisfactory to him, to mark mail "fraudulent" or "lottery mail" and to return it to its sender, 39 U. S. C. (Supp. II) § 4005; (3) 18 U. S. C. § 1342, making it a crime to conduct a fraudulent scheme by using a false name or address, also has a counterpart civil section empowering the Postmaster General, upon evidence satisfactory to him, to require proof of identity or to send such mail to the dead letter office, 39 U. S. C. (Supp. II) § 4003; (4) 18 U. S. C. §§ 1715 and 1716, making criminal the mailing of firearms and injurious articles, explicitly state that the Postmaster General may make regulations governing their transmission; (5) 18 U. S. C. § 1717, making criminal the mailing of matter advocating treason, explicitly authorized employees of the dead letter office to open such mail. See 74 Stat. 708. And see 7 U. S. C. § 150cc and 33 Stat. 1270 (plant pests); 38 Stat. 1113 (plants and plant products); 22 U. S. C. § 618 (foreign agents' propaganda advocating violent disorder in any other American republic); compare 7 U. S. C. § 1575 (false advertising of seed); 15 U. S. C. §§ 77q (fraudulent mat-

contrast, § 1461—itself silent as to sanctions except for the provision of criminal penalties—has no counterpart in the postal laws. It is mentioned once in the recodification of 1960—in § 4001 (a), a section collecting the various provisions designating matter as nonmailable and which, the Committee Report indicates and the floor discussion and reviser's note assure, was not intended to change existing law [21]—ambiguous throughout.

The removal of obscene material has not been the Post Office's only weapon against it. In 1950, § 4006 was enacted granting special powers over the mail of any person found, to the Postmaster General's satisfaction, to be using the mails to obtain money for or to be providing information about any obscene or vile article or thing: Postmasters could mark mail sent *to* that person "unlawful" and return it to its sender; and they could forbid payment to that person of any money orders or postal notes, and return the funds to the senders.[22] The clarity of the grant of these powers is no less noteworthy than their subsequent history. In 1956 the Postmaster General sought [23] and obtained the power to enter an order, pending the administrative proceeding to determine whether § 4006 should be invoked, under which all mail

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ter regarding securities), 80a–20 (solicitation of proxies), 80a–24 (sales literature regarding securities), 80b–3, 80b–5 and 80b–6 (investment advisers' materials); 50 U. S. C. § 789 (publications of registered Communist organizations).

See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 109.

[21] H. R. Rep. No. 36, 86th Cong., 1st Sess. A44 (1959); 105 Cong. Rec. 3157 (1959) and 106 Cong. Rec. 15,667 (1960); and see *supra*, n. 11.

[22] 64 Stat. 451, now revised and codified as 39 U. S. C. (Supp. II) § 4006. See 74 Stat. 578, 655.

[23] It appears that between 1950 and 1956, the Postmaster General asserted, and some courts agreed, that he already had the power. See *Stanard* v. *Olesen*, *supra*, n. 3, at 771.

addressed to the respondent could be impounded. The order was to expire at the end of 20 days unless the Postmaster General sought, in a Federal District Court, an order continuing the impounding. The 20-day order by the Postmaster General, and its extension by a court, were to issue only if "necessary to the effective enforcement of [§ 4006]." [24] In 1959, extensive hearings were held in the House on the Post Office's request that the 20-day period be extended to 45 days, and that the standard of necessity be changed to "public interest." [25] Instead, what was enacted in 1960 stripped the Postmaster General of his power to issue an interim order for any period, and directed him to seek a temporary restraining order in a Federal District Court.[26]

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[24] 70 Stat. 699.

[25] Hearings before House Subcommittee on Postal Operations of the Committee on Post Office and Civil Service on Obscene Matter Sent through the Mail, 86th Cong., 1st Sess. (1959).

[26] 74 Stat. 553. The codification of the postal laws, later in 1960, repealed 70 Stat. 699 (see 74 Stat. 708, 729) and not 74 Stat. 553, but the new § 4007 (74 Stat. 655) repeats the words of 70 Stat. 699. We need not now decide which is the governing provision.

The Senate Report in 1956 had said this:

"The committee recognizes that even in its present form the bill gives the Postmaster General extraordinary and summary powers to impose a substantial penalty by impounding a person's mail for up to 20 days in advance of any hearing or any review by the courts. Such power is directly contrary to the letter and spirit of normal due process, as exemplified by the Administrative Procedure Act, which requires a hearing before any penalty may be imposed. The Post Office Department has made its case for this legislation on the grounds that a temporary and summary procedure is required to deal with fly-by-night operators using the mails to defraud or to peddle pornography, who may go out of business—or change the name of their business or their business address—before normal legal procedures can be brought into operation. The Post Office Department has not recommended, nor does this committee approve, the use of the temporary impounding procedure under this bill as a substitute for the normal practice of an advance hearing or the bringing of an indict-

Congress gave full consideration to censorship of obscene material when it dealt with the Tariff Act of 1930. Prior to that year, the customs laws provided for the exclusion from the United States of obscene written matter, but required resort in the first instance to a Federal District Court for a determination of the matter's obscenity.[27] In the course of their work on the bill, the House Ways and Means Committee added language to exclude seditious as well as obscene material, and also replaced the judicial procedure with the generally applicable procedures for seizure by the customs officers, entailing judicial review only at the instance of a would-be importer. See H. R. Rep. No. 7, 71st Cong., 1st Sess., at 160, 185, 190, 244–245. It was in this form that the bill passed the House, and was reported by the Senate Committee, see S. Rep. No. 37, 71st Cong., 1st Sess. 60; 71 Cong. Rec. 4458 (remarks of Senator Smoot), but on the Senate floor it ran into strong expressions against customs censorship: fears about administrative determinations were enhanced by felt difficulties in applying the

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ment for violation of the criminal code in all cases involving legitimate and well-established business operations. The committee would not approve the use of the extraordinary summary procedure under the bill against legitimate publishers of newspapers, magazines, or books in cases in which a Postmaster General might take objection to an article, an issue, or a volume." S. Rep. No. 2234, 84th Cong., 2d Sess. 2–3.

[27] Section 305 of the Tariff Act of 1922, 42 Stat. 937, banned obscene and immoral matter, but subsection (c) provided:

"That any district judge . . . within the proper district . . . [may issue upon probable cause, conformably to the Constitution], a warrant directed to [a marshal or customs officer], directing him to . . . seize . . . any article or thing mentioned in [§ 305], and to make due and immediate return thereof, to the end that the same may be condemned and destroyed by proceedings, which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error." And see *supra*, n. 6; *supra*, pp. 505–506.

statute's proscriptions to particular material. Judicial review was thought insufficient, for that would leave the initiative for resort to the courts with the person subjected to the censorship: expense, inconvenience, and public embarrassment would, it was believed, result in unreviewed administrative exclusion. See generally 71 Cong. Rec. 4432–4439; 4445–4471. In support of the idea that the initial decision should be made by a court rather than a customs inspector, 72 Cong. Rec. 5417–5423, Senator Walsh of Montana said:

> "Everybody of right mind wants to prevent the circulation of such books as the Senator from Utah has in mind. That is not the point at all. Those immoral and obscene and indecent publications are printed in this country, as well as abroad. . . . How do we reach the situation? We make it a crime to circulate those books in this country, and we punish that offense the same as we punish every other offense, by proper prosecution. Likewise, we prohibit the circulation of material of that kind in the mails, and if anybody circulates it in the mails he becomes liable to indictment and prosecution. That is the way we endeavor to deal with that thing." 72 Cong. Rec. 5419. See also *id.*, at 5425, 5430. But compare the remarks of Senators Copeland, Cutting, and Fletcher, 71 Cong. Rec., at 4435, 4450.

He then offered an amendment to impose criminal sanctions for importing proscribed matter, and to require the matter's detention by the customs for transmittal to the appropriate authorities to commence judicial forfeiture proceedings. *Id.*, at 5421. However, there were misgivings about the criminal sanction; it was thought by some to jeopardize borderline activity too seriously. *Id.*, at 5423–5431. The Senate passed a provision corresponding to Senator Walsh's amendment, but without

a criminal sanction, 72 Cong. Rec. 5501–5520, and this was enacted into law. Thus the House Committee's attempt to revert from judicial to administrative determinations in the initial phase of customs censorship was emphatically rebuffed.

III.

It is clear that the Post Office has long practiced administrative censorship of allegedly obscene mailings generally. However, the formal regulations prescribing a procedure are new.[28] The practice was described in 1952 by the Solicitor of the Department when testifying before a congressional committee:

> "[W]e have an informal procedure, which, so far, hasn't been considered or tested out in the court, so we have gotten by with it so far. That is where a postmaster finds obscene matter at the point of entry of the mail into the post office, and if he is in doubt as to whether it is good or bad he will send it to the Solicitor's office for a ruling. . . ."

He also said:

> "If we had to hold hearings on all of those, if any court should ever decide that those hearings also come under the Administrative Procedure Act, we are just hopelessly sunk, that is all; we are just lost.
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> "They may, but they have never taken us into court on it. We just hope that we get by with it as long as we can." [29]

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[28] These date from 1957. See 39 CFR §§ 14.4, 203 (1962).

[29] See *Wong Yang Sung* v. *McGrath*, 339 U. S. 33; *Riss & Co.* v. *United States*, 341 U. S. 907; *Cates* v. *Haderlein*, 342 U. S. 804; *Walker* v. *Popenoe*, 80 U. S. App. D. C. 129, 149 F. 2d 511; *Door* v. *Donaldson*, 90 U. S. App. D. C. 188, 195 F. 2d 764. And see, *supra*, n. 23.

And:

> "[S]ometimes you can get five people together, and you can give them five pieces of mail, and ask them to mark them, and you will get five different results, because in some cases it is just one of those things that depends on your own personal ideas and your own bringing up; it depends upon how strongly you feel about things, and there are some types of that material that you just can't get two people to agree on no matter how reasonably and how objectively they look upon it. It is just an honest difference of opinion. We experience it all the time, so we have our conferences, and we decide what is going to be the best thing to do. . . .
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> . . . . .
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> "We have no trouble with prosecutions on things that are definitely obscene, but it is this material that is this way and that way that is very, very difficult to prosecute." Hearings before the Select Committee on Current Pornographic Materials, House of Representatives, on Investigation of Literature Allegedly Containing Objectionable Material, 82d Cong., 2d Sess. 281, 282 (1952).

It also is clear that this was not the first or last occasion on which Post Office practice has been brought to the attention of a congressional committee.[30] But the report

[30] See, *e. g.*, Hearings before House Subcommittee No. 8 of the Committee on the Post Office and Post Roads on H. R. 5370, 74th Cong., 1st Sess (1935); and Hearings, *supra*, n. 25; S. Rep. No. 2179, 81st Cong., 2d Sess. (1950); S. Rep. No. 113, 84th Cong., 1st Sess. (1955); Attorney General's Committee on Administrative Procedure, Post Office Department (1940); 19 Op. Atty. Gen. 667 (1890) (upholding exclusion from the mails of allegedly obscene portions of Tolstoi's "Kreutzer Sonata"); 4 Op. Asst. Atty. Gen., Post-Office Dept. 741 (1908) (holding that § 1461 is a civil as well

of the 1952 Select Committee, which listed § 1461 as a criminal statute, certainly did not dispel the continuing ambiguity surrounding that section. And the report said:

> "There are other means of handling this problem than by the ban of the censor, means which can be applied without danger of infringing on the freedom of the press . . . ." [31]

But, in any event, testimony before committees, committee reports, and administrative usurpation, do not, either singly or collectively, suffice to establish authorization.

IV.

We have sustained the criminal sanctions of § 1461 against a challenge of unconstitutionality under the First Amendment. *Roth* v. *United States,* 354 U. S. 476. We have emphasized, however, that the necessity for safeguarding First Amendment protections for nonobscene materials means that Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Marcus* v. *Search Warrant,* 367 U. S. 717, 731. I imply no doubt that

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as a criminal provision, and that the Post Office "in passing upon the mailability of matter under this statute . . . is not confined to the strict construction of the terms of the enactment which must be followed by a court in determining whether in a criminal case its provisions have been violated"). And see the sharp—and constitutionally colored—opposition to and rejection of a 1915 proposal that would have authorized the Postmaster General to close the mails to material sent by a person he had determined to be engaged in publishing obscene matter. Hearings before House Committee on the Post Office and Post Roads on Exclusion of Certain Publications from the Mails, 63d Cong., 3d Sess. (1915); *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 424 (Brandeis, J., dissenting).

[31] H. R. Rep. No. 2510, 82d Cong., 2d Sess. 5, 32.

Congress could constitutionally authorize a noncriminal process in the nature of a judicial proceeding under closely defined procedural safeguards. But the suggestion that Congress may constitutionally authorize any process other than a fully judicial one immediately raises the gravest doubts. However, it is enough to dispose of this case that Congress has not, in § 1461, authorized the Postmaster General to employ any process of his own to close the mails to matter which, in his view, falls within the ban of that section. "The provisions . . . would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country." *Hannegan* v. *Esquire, Inc.*, 327 U. S., at 156. I, therefore, concur in the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

While those in the majority like ancient Gaul are split into three parts, the ultimate holding of the Court today, despite the clear congressional mandate found in § 1461, requires the United States Post Office to be the world's largest disseminator of smut and Grand Informer of the names and places where obscene material may be obtained. The Judicial Officer of the Post Office Department, the District Court, and the Court of Appeals have all found the magazines in issue to be nonmailable on the alternative grounds that they are obscene and that they contain information on where obscene material may be obtained. The Court, however, says that these magazines must go through the mails. Brother HARLAN, writing for himself and Brother STEWART, finds that the magazines themselves are unobjectionable because § 1461 is not so narrowly drawn as to prohibit the mailing of material "that incites immoral sexual conduct," and that the presence of information leading to obscene material does not taint

the magazines because their publishers were unaware of the true nature of this information. Brother BRENNAN, joined by THE CHIEF JUSTICE and Brother DOUGLAS, finds that § 1461 does not authorize the Postmaster General through administrative process to close the mails to matter included within its proscriptions. Since in my view the Postmaster General is required by § 1461 to reject nonmailable matter, I would affirm the judgment on the sole ground that the magazines contain information as to where obscene material can be obtained and thus are nonmailable. I, therefore, do not consider the question of whether the magazines as such are obscene.

I.

The procedures followed below can be described briefly. Petitioners deposited in the Post Office in Alexandria, Virginia, six parcels containing 405 copies of three magazines which they published. The parcels were directed to petitioners' agent in Chicago and marked as second class matter. Being unsealed and subject to inspection,[1] the Postmaster noticed that the material appeared to be obscene. Under the regulations of the Post Office Department in effect since 1902, the Alexandria Postmaster notified the General Counsel of the Post Office Department in Washington and submitted samples of the material; the General Counsel determined the magazines to be nonmailable under § 1461 and notified petitioners' president. Petitioners sought injunctive relief against the Department in the District Court on the grounds that the magazines did not violate § 1461 and the procedure used amounted to an unconstitutional "ex parte administrative prior restraint," but the suit was dismissed for determination of the issue at an administrative hearing provided for by the Department's regulations. After a full

[1] 39 U. S. C. (Supp. II) § 4058.

hearing, at which petitioners did not dispute the congressional authorization to reject the six parcels for second class mailings, the Judicial Officer declared the material nonmailable. Petitioners contested this finding by judicial review in the District Court, where the action of the Judicial Officer was upheld.

MR. JUSTICE BRENNAN, as I have indicated, has reached the conclusion that when the Congress originally passed the Act in question some 97 years ago it granted no power to the Post Office to refuse to receive and carry matter declared by the Act to be nonmailable. Since this point was neither presented below nor argued here, I do not believe it to be properly before us. Brother BRENNAN, however, rests his concurring opinion on it and for that reason I shall discuss the issue.[2]

Section 1461 explicitly provides that:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and . . . [e]very written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained . . . [*i*]*s declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.*" (Emphasis supplied.)

Its genesis was in Section 16 of the Act of March 3, 1865, 13 Stat. 507, which when reported in the Senate had two parts:

> "[N]o obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States;

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[2] I agree with the conclusion in that opinion that petitioners' constitutional claim cannot be considered here.

> but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct."
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> "[A]ny person or persons who shall deposit or cause to be deposited in any post office or branch post office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor . . . ." Cong. Globe, 38th Cong., 2d Sess. 661.

The sponsor of the bill advised the Senate that it had a twofold effect: "The first part of it provides that if such [obscene] publications are in the mails the postmasters may take them out; and the latter part provides a penalty and a punishment for those who put them into the mails." This explanation of the sponsor seems enough to undermine Brother BRENNAN'S contention, but there is even more. Senator Johnson of Maryland apparently feared that obscene matter might be mailed in sealed envelopes and that "the postmaster . . . will break the seal." He moved to strike out the first part of the bill. Senator Sherman, however, objected, saying that *"the legislative prohibition against carrying such matter when it is known to the postmasters should be left.* Probably the second clause allowing him to open mail matter should be struck out." *Ibid.* (Emphasis supplied.) Senator Johnson acquiesced in this suggestion, and thus the bill as finally passed clearly permitted postmasters to refuse matters which were known by them to be obscene, so long as seals were not broken.[3]

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[3] The magazines here involved were second class matter and thus were unsealed and subject to inspection. 39 U. S. C. (Supp. II) § 4058.

The 1873 postal regulations reflected this power to exclude obscene matter from the mails,[4] as have all succeeding ones, *e. g.*, Postal Laws and Regulations (1893 ed.) § 335. In 1876 the Act was amended to substantially its present form. 19 Stat. 90. It not only declared certain material "to be non-mailable matter" but added that such "shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier." A single comment by the bill's sponsor in the House reflects the understanding that this section, both before and after amendment, authorized exclusion:

> "[T]he proposed bill in no wise changes the law as it now is except to provide a penalty for the circulation of obscene literature. By an oversight in drafting the original section the penalty applies only to the disposition of articles circulated or sold for the purpose of procuring abortion or preventing conception. *Already this obscene class of matter spoken of in the other portion of the section is prohibited from passing through the mails,* but no penalty is provided. . . . [I]t in no way changes the section as it now is. It makes nothing non-mailable that is not now non-mailable. It merely provides a penalty. . . ." 4 Cong. Rec. 695 (1876). (Emphasis supplied.)

Regulations establishing the procedure now used by the Department to determine questions of mailability were adopted in 1902. And in 1960 in a recodification the Congress included § 1461 within its collection of provisions which designate matter as nonmailable. 39 U. S. C. (Supp. II) § 4001 (a).

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[4] "All books, pamphlets, circulars, prints, &c., of an obscene, vulgar, or indecent character . . . *must be withdrawn from the mails* by postmasters at either the office of mailing or the office of delivery." Postal Laws and Regulations (1873 ed.) § 88. (Emphasis supplied.)

In light of the language of the statutes, the legislative history, the subsequent recodification and the consistent history of administrative interpretation, it stretches my imagination to understand how one could conclude that Congress did not authorize the Post Office Department to exclude nonmailable material. As Justice Brandeis said in *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 418, 421 (1921) (dissenting opinion):

> "The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.
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> "As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. The existence in the Postmaster General of the power to do this cannot be doubted. The only question which can arise is whether in the individual case the power has been illegally exercised."

II.

Let us now turn to the opinion of Brother HARLAN and first take up the question whether magazines which indisputably contain information on where obscene material may be obtained can be considered nonmailable apart from the sender's scienter. Giving regard to the wording of § 1461, the interests involved, and the nature of the sanction imposed, I fail to see how the sender's scienter is anywise material to a determination of nonmailability.

Section 1461 very explicitly demands that no information "be conveyed in the mails or delivered from any post office or by any letter carrier" if it in fact tells how obscene material can be obtained. This command running to those charged with the administration of the postal system is not conditioned by the words of the statute upon the sender's scienter or any remotely similar consideration. When it wants to inject a scienter requirement, the Congress well knows the words to use, as evidenced by the very next sentence in § 1461 establishing the criminal sanctions: "Whoever *knowingly* uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both . . . ." (Emphasis supplied.) Congress could not have made it more clear that the sender's knowledge of the material to be mailed did not determine its mailability but only his responsibility for mailing it. Nor is there any reason why Congress—in a civil action—should have wanted it any other way. The sender's knowledge of the matter sought to be mailed is immaterial to the harm caused to the public by its dissemination. Finally, interpreting § 1461 to mean what it says would not give rise to the "serious constitutional question" envisioned. This fear is premised entirely on *Smith* v. *California,* 361 U. S. 147 (1959), which was a criminal case. Surely the prerequisites to criminal responsibility are quite different from the tests for the use of the mails. The present determination of nonmailability of bulk packages of magazines to newsstands rains no sanctions or incriminations upon the publishers of these magazines nor does it confiscate or impound the magazines. For these reasons, I believe the only possible interpretation of § 1461 is that the sender's scienter is immaterial in determining the mailability of information on where obscene material can be obtained.

In passing, it might be noted that a requirement of scienter gives rise to some interesting problems. For instance: Is the sender's scienter permanently fixed at the time the material is first unsuccessfully offered for mailing, or is his scienter to be re-evaluated when the material is again offered for mailing? How are equitable principles such as "clean hands" and "he who seeks equity must do equity" squared in a proceeding to enjoin an administrative non-mailable order with an insistence on mailing material which has been shown to contain information leading to obscene material?

However, assuming that the knowledge of the sender is material in determining the mailability of these magazines, I submit the undisputed facts and findings compel as a matter of law the conclusion that the petitioners knew that materials published in their magazines informed their readers where obscene matter might be obtained. To say the least, these facts and findings are such that this Court ought not to set itself up as a fact-finder but should remand the case for a determination by those who have been entrusted initially with this responsibility.[5]

The content and direction of the magazines themselves are a tip-off as to the nature of the business of those who solicit through them. The magazines have no social, educational, or entertainment qualities but are designed solely as sex stimulants for homosexuals. They "consist almost entirely of photographs of young men in nude or practically nude poses handled in such a manner as to focus attention on their genitals or buttocks or to emphasize

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[5] If the express rejection by the Judicial Officer of petitioners' proposed finding that they had "no personal knowledge of the material sold by the advertisers" is taken as a finding to the contrary, then of course this is entitled to the deference accorded administrative findings, cf., *e. g.*, *Labor Board* v. *Walton Mfg. Co.*, 369 U. S. 404 (1962).

these parts . . . ." Because of this content the magazines do "not appeal to the ordinary male adult, . . . [who] would have no interest in them and would not buy them under ordinary circumstances and . . . [therefore] the readers of these publications consist almost entirely of male homosexuals and possibly a few adolescent males . . . ." The publishers freely admit that the magazines are published to appeal to the male homosexual group. The advertisements and photographer lists in such magazines were quite naturally "designed so as to attract the male homosexual and to furnish him with names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained." Moreover, the advertisements themselves could leave no more doubt in the publishers' minds than in those of the solicited purchasers. To illustrate: some captioned a picture of a nude or scantily attired young man with the legend "perfectly proportioned, handsome, male models, age 18–26." Others featured a photograph of a nude male with the area around the privates obviously retouched so as to cover the genitals and part of the pubic hair and offered to furnish an "original print of this photo." Finally, each magazine specifically endorsed its listed photographers and requested its readers to support them by purchasing their products. In addition, three of the four magazines involved expressly represented that they were familiar with the work of the photographers listed in their publications.[6]

Turning to Womack, the president and directing force of all three corporate publishers, it is even clearer that we are not dealing here with a "Jack and Jill" operation. Mr. Womack admitted that the magazines were planned for homosexuals, designed to appeal to and stim-

[6] The magazines were offered in six bundles, apparently with copies of each of the four magazines intermingled among the bundles.

ulate their erotic interests. To improve on this effect, he made suggestions to photographers as to the type of pictures he wanted. For example, he informed one of the studios listed in his publications that "physique fans want their 'truck driver types' already cleaned up, showered, and ready for bed . . . [and] it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal." Womack had also suggested to the photographers that they exchange customer names with the hope of compiling a master list of homosexuals. He himself had been convicted of selling obscene photographs via the mails. *Womack* v. *United States,* 111 U. S. App. D. C. 8, 294 F. 2d 204 (1961). More recently he has pleaded not guilty by reason of insanity to like charges. Washington Post, Feb. 1, 1962, p. D–3. Furthermore, he was warned in March, April, and July of 1959 that a number of his photographer advertisers were being prosecuted for mailing obscene matter and that he might be violating the law in transmitting through the mails their advertisements. However, he continued to disseminate such information through the mails, removing photographers from his lists only as they were convicted. Finally, through another controlled corporation not here involved, he filled orders for one of his advertisers sent in by the readers of his magazines. This material was found to be obscene and like all of the above facts and findings it is not contested here.

The corporate petitioners are chargeable with the knowledge of what they do, as well as the knowledge of their president and leader. How one can fail to see the obvious in this record is beyond my comprehension. In the words of Milton: "O dark, dark, dark amid the blaze of noon." For one to conclude that the above undisputed facts and findings are insufficient to show the required scienter, however stringently it may be defined, is in effect

to repeal the advertising provisions of § 1461. To condition nonmailability on proof that the sender actually saw the material being sold by his advertisers is to portray the Congress as the "mother" in the jingle, "Mother, may I go out to swim? Yes, my darling daughter. Hang your clothes on a hickory limb and don't go near the water."

For these reasons I would affirm the decision below.

GLIDDEN COMPANY *v.* ZDANOK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 242. Argued February 21, 26, 1962.—Decided June 25, 1962.*

The Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III of the Constitution; and their judges, including retired judges, may validly serve, by designation and assignment by the Chief Justice of the United States under 28 U. S. C. §§ 293 (a) and 294 (d), on United States District Courts and Courts of Appeals. Pp. 531–589.

288 F. 2d 99; 111 U. S. App. D. C. 238, 296 F. 2d 360, affirmed.

Chester Bordeau argued the cause for petitioner in No. 242. With him on the briefs was *William P. Smith.*

Morris Shapiro argued the cause for respondents in No. 242. With him on the briefs was *Harry Katz.*

Solicitor General Cox argued the cause for the United States, as intervenor, in No. 242. With him on the brief were *Assistant Attorney General Miller, Oscar H. Davis* and *Philip R. Monahan.*

By special leave of Court, 368 U. S. 973, *Francis M. Shea* argued the cause in No. 242 for the Chief Judge and Associate Judges of the United States Court of Claims, as *amici curiae,* urging affirmance. With him on the briefs was *Richard T. Conway.*

Briefs of *amici curiae,* in support of the petition in No. 242, were filed by *William B. Barton* for the Chamber of Commerce of the United States; *John E. Branch* for the Georgia State Chamber of Commerce; *Henry E. Seyfarth* for the Illinois State Chamber of Commerce;

*Together with No. 481, *Lurk* v. *United States,* on certiorari to the United States Court of Appeals for the District of Columbia Circuit, argued February 21, 1962.

Edward C. First, Jr. and *Gilbert Nurick* for the Pennsylvania State Chamber of Commerce; *Frank C. Heath* for the Chamber of Commerce of the City of Cleveland, Ohio; *Charles H. Tuttle* for the American Spice Trade Association; *Carl M. Gould* for the California Manufacturers Association; *Ashley Sellers* and *Jesse E. Baskette* for the National Association of Margarine Manufacturers; and *Daniel S. Ring* for the National Paint, Varnish and Lacquer Association, Inc.

Eugene Gressman argued the cause and filed briefs for petitioner in No. 481.

Solicitor General Cox argued the cause for the United States in No. 481. With him on the brief were *Assistant Attorney General Miller, Oscar H. Davis, Beatrice Rosenberg* and *Philip R. Monahan.*

By special leave of Court, *Roger Robb* argued the cause and filed a brief in No. 481 for the Chief Judge and Associate Judges of the United States Court of Customs and Patent Appeals, as *amici curiae,* urging affirmance.

MR. JUSTICE HARLAN announced the judgment of the Court and an opinion joined by MR. JUSTICE BRENNAN and MR. JUSTICE STEWART.

In *Ex parte Bakelite Corp.,* 279 U. S. 438, and *Williams* v. *United States,* 289 U. S. 553, this Court held that the United States Court of Customs and Patent Appeals and the United States Court of Claims were neither confined in jurisdiction nor protected in independence by Article III of the Constitution, but that both had been created by virtue of other, substantive, powers possessed by Congress under Article I. The Congress has since pronounced its disagreement by providing as to each that "such court is hereby declared to be a court established under article III of the Constitution of the United

States." [1] The petitioners in these cases invite us to reaffirm the authority of our earlier decisions, and thus hold for naught these congressional pronouncements, at least as sought to be applied to judges appointed prior to their enactment.

No. 242 is a suit brought by individual employees in a New York state court to recover damages for breach of a collective bargaining agreement, and removed to the Federal District Court for the Southern District of New York by the defendant employer on the ground of diversity of citizenship. The employees' right to recover was sustained by a divided panel of the Court of Appeals, in an opinion by Judge J. Warren Madden, then an active judge of the Court of Claims sitting by designation of the Chief Justice of the United States under 28 U. S. C. § 293 (a).[2] No. 481 is a criminal prosecution instituted in the United States District Court for the District of Columbia and resulting in a conviction for armed robbery. The trial was presided over by Judge Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals sitting by similar designation.[3] The petitioner's application for leave to appeal to the Court of Appeals

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[1] Act of July 28, 1953, § 1, 67 Stat. 226, added to 28 U. S. C. § 171 (Court of Claims); Act of August 25, 1958, § 1, 72 Stat. 848, added to 28 U. S. C. § 211 (Court of Customs and Patent Appeals). See also Act of July 14, 1956, § 1, 70 Stat. 532, added to 28 U. S. C. § 251 (Customs Court).

[2] "The Chief Justice of the United States may designate and assign temporarily any judge of the Court of Claims or the Court of Customs and Patent Appeals . . . to perform judicial duties in any circuit, either in a court of appeals or district court, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."

[3] 28 U. S. C. § 294 (d) authorizes assignment of a retired judge from either court to "perform such judicial duties as he is willing and able to undertake" in any circuit.

in forma pauperis, respecting the validity of this designation and alleged trial errors, was upheld by this Court last Term, 366 U. S. 712; we are now asked to review the Court of Appeals' affirmance of his conviction. Because of the significance of the "designation" issue for the federal judicial system, we granted certiorari in the two cases, 368 U. S. 814, 815, limited to the question whether the judgment in either was vitiated by the respective participation of the judges named.[4]

The claim advanced by the petitioners, that they were denied the protection of judges with tenure and compensation guaranteed by Article III, has nothing to do with the manner in which either of these judges conducted himself in these proceedings. No contention is made that either Judge Madden or Judge Jackson displayed a lack of appropriate judicial independence, or that either sought by his rulings to curry favor with Congress or the Executive. Both indeed enjoy statutory assurance of tenure and compensation,[5] and were it not for the explicit provisions of Article III we should be quite unable to say that either judge's participation even colorably denied the petitioners independent judicial hearings.

Article III, § 1, however, is explicit and gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record. It provides:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

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[4] The petition in No. 481 sought certiorari only as to that issue.

[5] 10 Stat. 612 (1855), as amended, 28 U. S. C. § 173 (Court of Claims); 46 Stat. 590, 762 (1930), as amended, 28 U. S. C. § 213 (Court of Customs and Patent Appeals). Judge Madden was appointed in 1941, Brief for Petitioner in No. 242, pp. 7–8, and retired in 1961, 290 F. 2d xvi; Judge Jackson was appointed in 1937, Brief for Petitioner in No. 481, pp. 9–10, and retired in 1952, 193 F. 2d xv.

> Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." [6]

Apart from this provision, it is settled that neither the tenure nor salary of federal officers is constitutionally protected from impairment by Congress. *Crenshaw* v. *United States,* 134 U. S. 99, 107–108; cf. *Butler* v. *Pennsylvania,* 10 How. 402, 416–418. The statutory declaration, therefore, that the judges of these two courts should serve during good behavior and with undiminished salary, see note 5, *supra,* was ineffective to bind any subsequent Congress unless those judges were invested at appointment with the protections of Article III. *United States* v. *Fisher,* 109 U. S. 143, 145; see *McAllister* v. *United States,* 141 U. S. 174, 186. And the petitioners naturally point to the *Bakelite* and *Williams* cases, *supra,* as establishing that no such constitutional protection was in fact conferred.

The distinction referred to in those cases between "constitutional" and "legislative" courts has been productive of much confusion and controversy. Because of the highly theoretical nature of the problem in its present context,[7] we would be well advised to decide these cases on narrower grounds if any are fairly available. But for reasons that follow, we find ourselves unable to do so.

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[6] The bearing of § 2 of Art. III on petitioners' claims is discussed later. *Infra,* pp. 562–583.

[7] The abstractness of the present controversy is graphically demonstrated by the disparity in volume between records and briefs. The records in both cases amount to but 66 pages of motions, opinions, and the like, with no relevant transcripts of proceedings, while the briefs extend to 533 pages exclusive of appendices.

I.

No challenge to the authority of the judges was filed in the course of the proceedings before them in either case. The Solicitor General, who submitted briefs and arguments for the United States, has seized upon this circumstance to suggest that the petitioners should be precluded by the so-called *de facto* doctrine from questioning the validity of these designations for the first time on appeal.

Whatever may be the rule when a judge's authority is challenged at the earliest practicable moment, as it was in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, in other circumstances involving judicial authority this Court has described it as well settled "that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public." *McDowell* v. *United States*, 159 U. S. 596, 602. The rule is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. Although a United States Attorney may be permitted on behalf of the public to upset an order issued upon defective authority, *Frad* v. *Kelly*, 302 U. S. 312, a private litigant ordinarily may not. *Ball* v. *United States*, 140 U. S. 118, 128–129.

The rule does not obtain, of course, when the alleged defect of authority operates also as a limitation on this Court's appellate jurisdiction. *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (three-judge court); *United States* v. *Emholt*, 105 U. S. 414 (certificate of divided opinion). In other circumstances as well, when the statute claimed to restrict authority is not merely technical

but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity. *E. g., American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 387–388.

A fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds. In *McDowell* v. *United States* itself, *supra*, at 598–599, the Court, while holding that any defect in statutory authorization for a particular intracircuit assignment was immunized from examination by the *de facto* doctrine, specifically passed upon and upheld the constitutional authority of Congress to provide for such an assignment. And in *Lamar* v. *United States*, 241 U. S. 103, 117–118, the claim that an intercircuit assignment violated the criminal venue restrictions of the Sixth Amendment and usurped the presidential appointing power under Art. II, § 2, was heard here and determined upon its merits, despite the fact that it had not been raised in the District Court or in the Court of Appeals or even in this Court until the filing of a supplemental brief upon a second request for review.

The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. See *O'Donoghue* v. *United States*, 289 U. S. 516, 532–534. It should be examinable at least on direct review, where its consideration encounters none of the objections associated with the principle of *res judicata*, that there be an end to litigation. At the most is weighed in opposition the disruption to sound appellate process entailed by entertaining objections not raised below, and that is plainly insufficient to overcome the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers. So this Court has con-

cluded on an analogous balance struck to protect against intruding federal jurisdiction into the area constitutionally reserved to the States: Whether diversity of citizenship exists may be questioned on direct review for the first time in this Court. *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 382; *City of Gainesville* v. *Brown-Crummer Investment Co.,* 277 U. S. 54, 59. We hold that it is similarly open to these petitioners to challenge the constitutional authority of the judges below.

II.

The Court of Appeals for the District of Columbia found it unnecessary to reach the question whether Judge Jackson enjoyed constitutional security of tenure and compensation. It held that even if he did not, Congress might authorize his assignment to courts in the District of Columbia, by virtue of its power "To exercise exclusive Legislation in all Cases whatsoever" over the District. Art. I, § 8, cl. 17. The Solicitor General, in support of that ruling, argues here that because the criminal charge against petitioner Lurk was violation of a local statute, D. C. Code, 1961, § 22–2901, rather than of one national in application, its trial did not require the assignment of an Article III judge.

The question thus raised is itself of constitutional dimension, and one which we need not reach if an Article III judge was in fact assigned. In the companion case, No. 242, the necessity for such a judge is uncontested. The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants.[8] Authority for the Federal Government to

[8] Under our limited writ of certiorari, 368 U. S. 814, we have no occasion to consider whether federal law was more appropriately the measure of the employer's obligation. Cf. *Teamsters Local 174* v. *Lucas Flour Co.,* 369 U. S. 95.

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decide questions of state law exists only by virtue of the Diversity Clause in Article III. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; see *Murray's Lessee* v. *Hoboken Land & Improvement Co.,* 18 How. 272 284. For this reason, the question whether Judge Madden enjoyed constitutional independence is inescapably presented. Since decision of that question involves considerations bearing directly upon the constitutional status of Judge Jackson, we deem it appropriate to dispose of both cases on the same grounds, without at present intimating any view as to the correctness of the holding below by the Court of Appeals for the District of Columbia.

III.

The next question is whether the character of the judges who sat in these cases may be determined without reference to the character of the courts to which they were originally appointed. If it were plain that these judges were invested upon confirmation with Article III tenure and compensation, it would be unnecessary for present purposes to consider the constitutional status of the Court of Claims and the Court of Customs and Patent Appeals.

No such course, however, appears to be open. The statutes under which Judge Madden and Judge Jackson were appointed speak of service only on those courts. 28 U. S. C. §§ 171, 211. They were not, as were the judges selected for the late Commerce Court, appointed as "additional circuit judges," Act of June 18, 1910, c. 309, 36 Stat. 539, 540, whose tenure might be constitutionally secured regardless of the fortunes of their courts. See 50 Cong. Rec. 5409–5418 (1913); *Donegan* v. *Dyson,* 269 U. S. 49; Frankfurter and Landis, The Business of the Supreme Court (1927), 168–173. It is true that at the time of Judge Jackson's appointment there was in force a statute authorizing assignment of Court of Customs and Patent Appeals judges to serve on the courts of the

District of Columbia. Act of September 14, 1922, c. 306, § 5, 42 Stat. 837, 839. At that time, however, before the *O'Donoghue* decision, there seems to have been a consensus that the courts of the District were not confined or protected by Article III; as late as 1930, this Court regarded it as "recognized that the courts of the District of Columbia are not created under the judiciary article of the Constitution but are legislative courts . . . ." *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464, 468; and see Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 899–903 (1930). The 1922 Act cannot therefore be viewed *ex proprio vigore* as conferring Article III status on judges subsequently appointed to the Court of Customs and Patent Appeals.[9]

A more novel suggestion is that the assignment statute itself, 28 U. S. C. §§ 291–296, authorized the Chief Justice to appoint inferior Article III judges in the course of designating them for service on Article III courts.[10] See Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities under the Constitution, 28 Mich. L. Rev. 485 (1930); cf. *Ex parte Siebold*, 100 U. S. 371, 397–398; *Rice* v. *Ames*, 180 U. S. 371, 378. But we need not consider the constitutional questions involved in this suggestion, for the statute does not readily lend itself

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[9] The debates and reports in Congress display no awareness of the problem. See H. R. Rep. No. 1152, 67th Cong., 2d Sess. (1922); 62 Cong. Rec. 190–191, 207–209 (1921).

[10] Article II, § 2, cl. 2 of the Constitution provides that the President

". . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

to such a construction. If nothing else, the authority given the Chief Justice in 28 U. S. C. § 295 to revoke assignments previously made is wholly inconsistent with a reading of the statute as empowering him to appoint inferior Article III judges. Judges assigned by the Chief Justice who are not previously endowed with constitutional security of tenure and compensation thus can gain nothing by the designation.[11]

It is significant that Congress did not enact the present broad assignment statute until after it had declared the Court of Claims and the Court of Customs and Patent Appeals to be constitutional courts. Act of August 25, 1958, 72 Stat. 848. A major purpose of these declarations was to eliminate uncertainty whether regular Article III judges might be assigned to assist in the business of those courts when disability or disqualification made it difficult for them to obtain a quorum.[12] Those doubts, suggested by dicta in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460, would be expanded rather than allayed were we to hold that the judges of the Court of Claims and the Court of Customs and Patent Appeals enjoy the protections of Article III while leaving at large the status of those courts. For these various reasons, the constitutional quality of tenure and compensation extended

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[11] Compare the statute creating the Emergency Court of Appeals, to consist of three or more judges "designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals." Act of January 30, 1942, c. 26, § 204 (c), 56 Stat. 23, 32.

[12] Hearings on H. R. 1070 before Subcommittee No. 2 of the House Committee on the Judiciary, pp. 6–7, 24 (Unpublished, May 19, 1953; on file with the Clerk of the Committee) (testimony of Judge Howell of the Court of Claims); H. R. Rep. No. 695, 83d Cong., 1st Sess. 2, 5–6 (1953); S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953); H. R. Rep. No. 2349, 85th Cong., 2d Sess. (1958); S. Rep. No. 2309, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 16095 (1958) (remarks of Representative Keating).

Judges Madden and Jackson at the time of their confirmation must be deemed to have depended upon the constitutional status of the courts to which they were primarily appointed.

IV.

In determining the constitutional character of the Court of Claims and the Court of Customs and Patent Appeals, as we are thus led to do, we may not disregard Congress' declaration that they were created under Article III. Of course, Congress may not by fiat overturn the constitutional decisions of this Court, but the legislative history of the 1953 and 1958 declarations makes plain that it was far from attempting any such thing. Typical is a statement in the 1958 House Report that the purpose of the legislation was to "declare which of the powers Congress was intending to exercise when the court was created." H. R. Rep. No. 2349, 85th Cong., 2d Sess. 3 (1958); accord, H. R. Rep. No. 695, 83d Cong., 1st Sess. 3, 5, 7 (1953); and see S. Rep. No. 275, 83d Cong., 1st Sess. 2 (1953), substituted for S. Rep. No. 261, 83d Cong., 1st Sess. 2 (1953); 99 Cong. Rec. 8943, 8944 (1953) (remarks of Senator Gore).

"Subsequent legislation which declares the intent of an earlier law," this Court has noted, "is not, of course, conclusive in determining what the previous Congress meant. But the later law is entitled to weight when it comes to the problem of construction." *Federal Housing Administration* v. *Darlington, Inc.*, 358 U. S. 84, 90; accord, *New York, P. & N. R. Co.* v. *Peninsula Exchange*, 240 U. S. 34, 39. Especially is this so when the Congress has been stimulated by decisions of this Court to investigate the historical materials involved and has drawn from them a contrary conclusion. *United States* v. *Hutcheson*, 312 U. S. 219, 235–237. As examination of the House and Senate Reports makes evident, that is what occurred

here. *E. g.*, S. Rep. No. 2309, 85th Cong., 2d Sess. 2–3 (1958); H. R. Rep. No. 695, 83d Cong., 1st Sess. 3–5 (1953).

At the time when *Bakelite* and *Williams* were decided, the Court did not have the benefit of this congressional understanding. The *Williams* case, for example, arose under the Legislative Appropriation Act of June 30, 1932, c. 314, § 107 (a)(5), 47 Stat. 382, 402, which reduced the salary of all judges "except judges whose compensation may not, under the Constitution, be diminished during their continuance in office." Mr. Justice Sutherland, who wrote the Court's opinions in both *Williams* and *O'Donoghue,* was plainly disadvantaged by the absence of congressional intimation as to which judges of which courts were to be deemed exempted. See *O'Donoghue* v. *United States,* 289 U. S. 516, 529.

In the *Bakelite* case, to be sure, Mr. Justice Van Devanter said of an argument drawn from tenuous evidence of congressional understanding that it "mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S., at 459. Yet he would hardly have denied that explicit evidence of legislative intendment concerning the factors he thought controlling may be relevant and indeed highly persuasive. In any event, the *Bakelite* dictum did not embarrass the Court in deciding *O'Donoghue,* where it looked searchingly at "congressional practice" to determine what classification that body "recognizes." 289 U. S., at 548–550. We think the forthright statement of understanding embraced in the 1953 and 1958 declarations may be taken as similarly persuasive evidence for the problem now before us.

To give due weight to these congressional declarations is not of course to compromise the authority or responsi-

bility of this Court as the ultimate expositor of the Constitution. The *Bakelite* and *Williams* decisions have long been considered of questionable soundness. See, *e. g.*, Brown, The Rent in Our Judicial Armor, 10 G. W. L. Rev. 127 (1941); Hart and Wechsler, The Federal Courts and the Federal System (1953), 348–351; 1 Moore, Federal Practice (2d ed. 1961), 71 n. 21. They stand uneasily next to *O'Donoghue*, much of whose reasoning in sustaining the Article III status of the District of Columbia superior courts seems applicable to the Court of Claims and the Court of Customs and Patent Appeals. In *Pope* v. *United States*, 323 U. S. 1, 13–14, where the Solicitor General argued at length against the continued vitality of *Bakelite* and *Williams*, their authority was regarded as an open question.

Furthermore, apart from this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases, *e. g.*, *United States* v. *South Buffalo R. Co.*, 333 U. S. 771, 774–775; see *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 405–408 and n. 1–3 (Brandeis, J., dissenting), there is the fact that Congress has acted on its understanding and has provided for assignment of judges who have made decisions that are now said to be impeachable. In these circumstances, the practical consideration underlying the doctrine of *stare decisis*—protection of generated expectations—actually militates in favor of reexamining the decisions. We are well-advised, therefore, to regard the questions decided in those cases as entirely open to reconsideration.

V.

The Constitution nowhere makes reference to "legislative courts." The power given Congress in Art. I, § 8, cl. 9, "To constitute Tribunals inferior to the supreme Court," plainly relates to the "inferior Courts" provided for in Art. III, § 1; it has never been relied on for establishment of any other tribunals.

The concept of a legislative court derives from the opinion of Chief Justice Marshall in *American Insurance Co.* v. *Canter,* 1 Pet. 511, dealing with courts established in a territory. A cargo of cotton salvaged from a wreck off the coast of Florida had been purchased by Canter at a judicial sale ordered by a court at Key West invested by the territorial legislature with jurisdiction over cases of salvage. The insurers, to whom the property in the cargo had been abandoned by the owners, brought a libel for restitution, claiming in part that the prior decree was void because not rendered in a court created by Congress, as required for the exercise of admiralty jurisdiction under Article III. Chief Justice Marshall for the Court swept this objection aside by noting that the Superior Courts of Florida, which had been created by Congress, were staffed with judges appointed for only four years, and concluded that Article III did not apply in the territories:

> "These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." 1 Pet., at 546.

By these arresting observations the Chief Justice certainly did not mean to imply that the case heard by the Key West court was not one of admiralty jurisdiction otherwise properly justiciable in a Federal District Court sitting in one of the States. Elsewhere in the opinion he distinctly referred to the provisions of Article III to show that it was such a case. 1 Pet., at 545. All the Chief Justice meant, and what the case has ever after been

taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; [13] courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

The reasons for this are not difficult to appreciate so long as the character of the early territories and some of the practical problems arising from their administration are kept in mind. The entire governmental responsibility in a territory where there was no state government to assume the burden of local regulation devolved upon the National Government. This meant that courts had to be established and staffed with sufficient judges to handle the general jurisdiction that elsewhere would have been exercised in large part by the courts of a State.[14] But when the territories began entering into statehood, as they soon did, the authority of the territorial courts over matters of state concern ceased; and in a time when the size of the federal judiciary was still relatively small, that left the National Government with a significant

[13] Far from being "incapable of receiving" federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so. *Benner* v. *Porter*, 9 How. 235, 243; *Clinton* v. *Englebrecht*, 13 Wall. 434, 447; *Reynolds* v. *United States*, 98 U. S. 145, 154; *United States* v. *Coe*, 155 U. S. 76, 86; *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313; *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U. S. 237, 240–241; cf. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 338; see *Pope* v. *United States*, 323 U. S. 1, 13–14.

[14] Under *Barber* v. *Barber*, 21 How. 582, 584, for example, the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all such local matters, the territorial courts took cognizance of them. *Simms* v. *Simms*, 175 U. S. 162, 167–168; *De la Rama* v. *De la Rama*, 201 U. S. 303.

number of territorial judges on its hands and no place to put them. When Florida was admitted as a State, for example, Congress replaced three territorial courts of general jurisdiction comprising five judges with one Federal District Court and one judge.[15]

At the same time as the absence of a federal structure in the territories produced problems not foreseen by the Framers of Article III, the realities of territorial government typically made it less urgent that judges there enjoy the independence from Congress and the President envisioned by that article. For the territories were not ruled immediately from Washington; in a day of poor roads and slow mails, it was unthinkable that they should be. Rather, Congress left municipal law to be developed largely by the territorial legislatures, within the framework of organic acts and subject to a retained power of veto.[16] The scope of self-government exercised under these delegations was nearly as broad as that enjoyed by the States, and the freedom of the territories to dispense with protections deemed inherent in a separation of governmental powers was as fully recognized.[17]

Against this historical background, it is hardly surprising that Chief Justice Marshall decided as he did. It would have been doctrinaire in the extreme to deny the right of Congress to invest judges of its creation with authority to dispose of the judicial business of the territories. It would have been at least as dogmatic, having recognized the right, to fasten on those judges a guarantee

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[15] *Benner* v. *Porter*, 9 How. 235, 240, 244. For statutory techniques since developed to avoid the interregnal problems involved in that case, see *Metlakatla Indian Community* v. *Egan*, 363 U. S. 555, 557–559; 1 Moore, Federal Practice (2d ed. 1961), 32–34.

[16] See *Clinton* v. *Englebrecht*, 13 Wall. 434, 441–445; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655–656.

[17] Compare *Clinton* v. *Englebrecht*, *supra*, 13 Wall., at 446, 447, with *Dreyer* v. *Illinois*, 187 U. S. 71, 83–84.

of tenure that Congress could not put to use and that the exigencies of the territories did not require. Marshall chose neither course; conscious as ever of his responsibility to see the Constitution work, he recognized a greater flexibility in Congress to deal with problems arising outside the normal context of a federal system.

The same confluence of practical considerations that dictated the result in *Canter* has governed the decision in later cases sanctioning the creation of other courts with judges of limited tenure. In *United States* v. *Coe,* 155 U. S. 76, 85–86, for example, the Court sustained the authority of the Court of Private Land Claims to adjudicate claims under treaties to land in the territories, but left it expressly open whether such a course might be followed within the States. The Choctaw and Chickasaw Citizenship Court was similarly created to determine questions of tribal membership relevant to property claims within Indian territory under the exclusive control of the National Government. See *Stephens* v. *Cherokee Nation,* 174 U. S. 445; *Ex parte Joins,* 191 U. S. 93; *Wallace* v. *Adams,* 204 U. S. 415. Upon like considerations, Article III has been viewed as inapplicable to courts created in unincorporated territories outside the mainland, *Downes* v. *Bidwell,* 182 U. S. 244, 266–267; *Balzac* v. *Porto Rico,* 258 U. S. 298, 312–313; cf. *Dorr* v. *United States,* 195 U. S. 138, 145, 149, and to the consular courts established by concessions from foreign countries, *In re Ross,* 140 U. S. 453, 464–465, 480.[18]

The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting,

[18] See generally, as to each of these courts, 1 Moore, Federal Practice (2d ed. 1961), 40–44, 47–50.

the practical necessities, and the possible alternatives. When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling. *O'Donoghue* v. *United States,* 289 U. S. 516, 536–539.

Since the conditions obtaining in one territory have been assumed to exist in each, this Court has in the past entertained a presumption that even those territorial judges who have been extended statutory assurances of life tenure and undiminished compensation have been so favored as a matter of legislative grace and not of constitutional compulsion. *McAllister* v. *United States,* 141 U. S. 174, 186.[19] By a parity of reasoning, however, the presumption should be reversed when Congress creates courts the continuing exercise of whose jurisdiction is unembarrassed by such practical difficulties. See *Mookini* v. *United States,* 303 U. S. 201, 205. As the *Bakelite* and *Williams* opinions recognize, the Court of Claims and the Court of Customs and Patent Appeals were created to carry into effect powers enjoyed by the National Government over subject matter—roughly, payment of debts and collection of customs revenue—and not over localities. What those opinions fail to deal with is whether that distinction deprives *American Insurance Co.* v. *Canter* of controlling force.

The *Bakelite* opinion did not inquire whether there might be such a distinction. After sketching the history of the territorial and consular courts, it continued at once:

> "Legislative courts also may be created as special tribunals to examine and determine various matters,

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[19] We do not now decide, of course, whether the same conditions still obtain in each of the present-day territories or whether, even if they do, Congress might not choose to establish an Article III court in one or more of them.

> arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." 279 U. S., at 451.

Since in the Court's view the jurisdiction conferred on both the Court of Claims and the Court of Customs and Patent Appeals included "nothing which inherently or necessarily requires judicial determination," [20] both could have been and were created as legislative courts.

We need not pause to assess the Court's characterization of the jurisdiction conferred on those courts, beyond indicating certain reservations about its accuracy.[21] Nor need we now explore the extent to which Congress may commit the execution of even "inherently" judicial business to tribunals other than Article III courts. We may and do assume, for present purposes, that none of the jurisdiction vested in our two courts is of that sort, so that all of it might be committed for final determination to non-Article III tribunals, be they denominated legislative courts or administrative agencies.

But because Congress may employ such tribunals assuredly does not mean that it must. This is the crucial

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[20] *Ex parte Bakelite Corp.*, 279 U. S. 438, 453, 458; accord, *Williams* v. *United States*, 289 U. S. 553, 579.

[21] *Williams* itself recognized that the jurisdiction conferred on the Court of Claims by the Tucker Act, now 28 U. S. C. § 1491, to award just compensation for a governmental taking, empowered that court to decide what had previously been described as a judicial and not a legislative question. 289 U. S., at 581; see, *e. g.*, *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 327. As for *Bakelite*, its reliance, 279 U. S., at 458 n. 26, on *Cary* v. *Curtis*, 3 How. 236, for the proposition that disputes over customs duties may be adjudged summarily without recourse to judicial proceedings, appears to have overlooked the care with which that decision specifically declined to rule whether all right of action might be taken away from a protestant, even going so far as to suggest several judicial remedies that might have been available. See 3 How., at 250.

non sequitur of the *Bakelite* and *Williams* opinions. Each assumed that because Congress might have assigned specified jurisdiction to an administrative agency, it must be deemed to have done so even though it assigned that jurisdiction to a tribunal having every appearance of a court and composed of judges enjoying statutory assurances of life tenure and undiminished compensation. In so doing, each appears to have misunderstood the thrust of the celebrated observation by Mr. Justice Curtis, that

> ". . . there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284.

This passage, cited in both the *Bakelite* and *Williams* opinions,[22] plainly did not mean that the matters referred to could not be entrusted to Article III courts. Quite the contrary, the explicit predicate to Justice Curtis' argument was that such courts could exercise judicial power over such cases. For the very statute whose authorization of summary distress proceedings was sustained in the *Murray* case, also authorized the distrainee to bring suit to arrest the levy against the United States in a Federal District Court. And as to this, the author of the opinion stated, just before his more trenchant remark quoted above:

> "The United States consents that this fact of indebtedness may be drawn in question by a suit against them. Though they might have withheld

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[22] 279 U. S., at 451 n. 8; 289 U. S., at 579.

> their consent, we think that, by granting it, nothing which may not be a subject of judicial cognizance is brought before the court." [23]

Thus *Murray's Lessee,* far from furnishing authority against the proposition that the Court of Claims is a constitutional court, actually supports it.

To deny that Congress may create tribunals under Article III for the sole purpose of adjudicating matters that it might have reserved for legislative or executive decision would be to deprive it of the very choice that Mr. Justice Curtis insisted it enjoys. Of course possession of the choice, assuming it is coextensive with the range of matters confided to the courts,[24] subjects those courts to the continuous possibility that their entire jurisdiction may be withdrawn. See *Williams* v. *United States,* 289 U. S. 553, 580–581. But the threat thus facing their independence is not in kind or effect different from that sustained by all inferior federal courts. The great constitutional compromise that resulted in agreement upon Art. III, § 1, authorized but did not obligate Congress to create inferior federal courts. I Farrand, The Records of the Federal Convention (1911), 118, 124–125; The Federalist, No. 81 (Wright ed. 1961), at 509 (Hamilton). Once created, they passed almost a century without exercising any very significant jurisdiction. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 65–70 (1923); Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L. Q. 499 (1928). Throughout this period and beyond it up to today, they remained constantly subject to jurisdictional curtailment. *Turner* v. *Bank of North America,* 4 Dall. 8, 10 note (Chase, J.);

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[23] 18 How., at 284.

[24] But see note 21, *supra.*

Cary v. *Curtis*, 3 How. 236, 245; *Sheldon* v. *Sill*, 8 How. 441, 449; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 233–234. Even if it should be conceded that the Court of Claims or the Court of Customs and Patent Appeals is any more likely to be supplanted, we do not think the factor of constitutional significance.[25]

What has been said should suffice to demonstrate that whether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite. To ascertain whether the courts now under inquiry can meet those tests, we must turn to examine their history, the development of their functions, and their present characteristics.

VI.

A. *Court of Claims.*—The Court of Claims was created by the Act of February 24, 1855, c. 122, 10 Stat. 612, primarily to relieve the pressure on Congress caused by the volume of private bills. As an innovation the court was at first regarded as an experiment, and some of its creators were reluctant to give it all the attributes of a court by making its judgments final; instead it was authorized to hear claims and report its findings of fact and opinions to Congress, together with drafts of bills designed to carry its recommendations into effect. § 7, 10 Stat. 613; see Cong. Globe, 33d Cong., 2d Sess. 70–72 (1854) (remarks of Senators Brodhead and Hunter). From the outset, however, a majority of the court's proponents insisted that its judges be given life tenure as a means of assuring inde-

[25] See generally Hart and Wechsler, The Federal Courts and the Federal System (1953), 312–340, and more specifically, pp. 567–568, *infra*.

pendence of judgment, and their proposal won acceptance in the Act. § 1, 10 Stat. 612; see Cong. Globe, 33d Cong., 2d Sess. 71, 108–109 (Senator Hunter); 72 (Senator Clayton); 106 (Senator Brodhead); 110 (Senator Pratt); 114, 902 (the votes). Indeed there are substantial indications in the debates that Congress thought it was establishing a court under Article III. Cong. Globe, 33d Cong., 2d Sess. 108–109 (Senator Hunter); 110–111 (Senator Pratt); 111 (Senator Clayton); 113 (Senators Stuart and Douglas).

By the end of 1861, however, it was apparent that the limited powers conferred on the court were insufficient to relieve Congress from the laborious necessity of examining the merits of private bills. In his State of the Union message that year, President Lincoln recommended that the legislative design to provide for the independent adjudication of claims against the United States be brought to fruition by making the judgments of the Court of Claims final. The pertinent text of his address is as follows, Cong. Globe, 37th Cong., 2d Sess., Appendix, p. 2:

> "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals. The investigation and adjudication of claims, in their nature belong to the judicial department . . . . It was intended by the organization of the Court of Claims mainly to remove this branch of business from the Halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation, for want of power to make its judgments final."

By the Act of March 3, 1863, c. 92, § 5, 12 Stat. 765, 766, Congress adopted the President's recommendation and made the court's judgments final, with appeal to the

Supreme Court provided in certain cases. The significance of this nearly contemporaneous enactment for the light it sheds on the aims of the 1855 Congress is apparent.

There was one further impediment. Section 14 of the 1863 Act, 12 Stat. 768, provided that "no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury." In *Gordon* v. *United States*, 2 Wall. 561, this Court refused to review a judgment of the Court of Claims because it construed that section as giving the Secretary a revisory authority over the court inconsistent with its exercise of judicial power. Congress promptly repealed the offensive section, Act of March 17, 1866, c. 19, § 1, 14 Stat. 9, once again exhibiting its purpose to liberate the Court of Claims from itself and the Executive. Thereafter, the Supreme Court promulgated rules governing appeals from the court, 3 Wall. vii–viii, and took jurisdiction under them for the first time in *De Groot* v. *United States*, 5 Wall. 419.

The early appeals entertained by the Court furnish striking evidence of its understanding that the Court of Claims had been vested with judicial power. In *De Groot* the court had been given jurisdiction by special bill only after the passage of two private bills had failed to produce agreement by administrative officials upon adequate recompense. This Court was thus presented with a vivid illustration of the ways in which the same matter might be submitted for resolution to a legislative committee, to an executive officer, or to a court, *Murray's Lessee, supra*, and nevertheless accepted appellate jurisdiction over what was, necessarily, an exercise of the judicial power which alone it may review. *Marbury* v. *Madison*, 1 Cranch 137, 174–175.

After the repeal of § 14, the Court was quick to protect the Court of Claims' judgments from executive revision.

In *United States* v. *O'Grady*, 22 Wall. 641, a judgment had been diminished by the Secretary of the Treasury in an amount equal to a tax assertedly due, although the United States had not pleaded a set-off as it was entitled by the 1863 Act to do.[26] The Court of Claims and this Court on appeal held the deduction unwarranted in law, with the following pertinent closing observation:

> "Should it be suggested that the judgment in question was rendered in the Court of Claims, the answer to the suggestion is that the judgment of the Court of Claims, from which no appeal is taken, is just as conclusive under existing laws as the judgment of the Supreme Court, until it is set aside on a motion for a new trial." [27]

Like views abound in the early reports. In *United States* v. *Union Pacific R. Co.*, 98 U. S. 569, 603, for example, referring to Article III, the Court said:

> "Congress has, under this authority, created the district courts, the circuit courts, and the Court of Claims, and vested each of them with a defined portion of the judicial power found in the Constitution."

Such remained the view of the Court as late as *Miles* v. *Graham*, 268 U. S. 501, decided in 1925. There it was held, on the authority of *Evans* v. *Gore*, 253 U. S. 245, that the salary of a Court of Claims judge appointed even after enactment of the taxing statute in question was not subject to such diminution. Although the case was afterwards overruled on this point, *O'Malley* v. *Woodrough*, 307 U. S. 277, 283, what is of continuing interest is the

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[26] § 3, 12 Stat. 765, now 28 U. S. C. § 1503. See also 18 Stat. 481 (1875), as amended, 31 U. S. C. § 227, requiring the Comptroller General to bring suit against a nonconsenting judgment creditor if that official believes a debt not previously asserted as a set-off is due the United States.

[27] 22 Wall., at 648.

Court's reliance in *Miles* upon *Evans* v. *Gore,* where Mr. Justice Van Devanter for the Court devoted six full pages to recitation of the importance of the guarantees of tenure and salary contained in Article III.[28] How it was possible to say in *Bakelite,* 279 U. S., at 455, that the Court in *Miles,* decided only five years after *Evans* and with copious quotation from it, was unaware of the crucial question whether Article III extended its protection to a judge of the Court of Claims, is very difficult to understand.

In actuality, the Court's pre-*Bakelite* view of the Court of Claims is supported by the evidence of increasing confidence placed in that tribunal by Congress. The Tucker Act, § 1, 24 Stat. 505 (1887), now 28 U. S. C. § 1491, greatly expanded the jurisdiction of the court by authorizing it to adjudicate

> "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable . . . ."

All of the cases within this grant of jurisdiction arise either immediately or potentially under federal law within the meaning of Art. III, § 2. *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 818–819, 823–825; see *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *Federal Crop Insurance Corp.* v. *Merrill,* 332 U. S. 380; Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 184–196. The cases heard by the Court have

[28] *Evans* v. *Gore,* 253 U. S. 245, 248–254.

been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 U. S. C. § 1331, of the District Courts. *E. g., Causby* v. *United States,* 104 Ct. Cl. 342, 60 F. Supp. 751, *remanded for further findings,* 328 U. S. 256 (eminent domain); *Lovett* v. *United States,* 104 Ct. Cl. 557, 66 F. Supp. 142, aff'd, 328 U. S. 303 (bill of attainder); *Shapiro* v. *United States,* 107 Ct. Cl. 650, 69 F. Supp. 205 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

Indeed there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief. *United States* v. *Alire,* 6 Wall. 573; *United States* v. *Jones,* 131 U. S. 1; see Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 123–126. No question can be raised of Congress' freedom, consistently with Article III, to impose such a limitation upon the remedial powers of a federal court. *Lauf* v. *E. G. Shinner & Co.,* 303 U. S. 323, 330 (Norris-LaGuardia Act). But far from serving as a restriction, this limitation has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action. See *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, 703–704; *Malone* v. *Bowdoin,* 369 U. S. 643; Brenner, Judicial Review by Money Judgment in the Court of Claims, 21 Fed. B. J. 179 (1961).

"If there are such things as political axioms," said Alexander Hamilton, "the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number." The Federalist,

No. 80 (Wright ed. 1961), at 500. His sentiments were not ignored by the Framers of Article III. The Randolph plan, which formed the basis of that article, called for establishment of a national judiciary coextensive in authority with the executive and legislative branches. IV Farrand, The Records of the Federal Convention (rev. ed. 1937), 47–48. For, as Hamilton observed, a chief defect of the Confederation had been ". . . the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation." The Federalist, No. 22 (Wright ed. 1961), at 197. But because of the barrier of sovereign immunity, the laws controlling governmental rights and obligations could not for years obtain a fully definitive exposition. The creation of the Court of Claims can be viewed as a fulfillment of the design of Article III.

B. *The Court of Customs and Patent Appeals.*—The Court of Customs Appeals, as it was first known, was established by § 29 of the Customs Administrative Act of 1890, c. 407, 26 Stat. 131, as added by § 28 of the Payne-Aldrich Tariff Act of August 5, 1909, c. 6, 36 Stat. 11, 105, to review by appeal final decisions of the Board of General Appraisers (now Customs Court) respecting the classification and rate of duty applicable to imported merchandise. The Act was silent about the tenure of the judges, as had been the Judiciary Act of 1789, c. 20, §§ 3, 4, 1 Stat. 73–75. The salary, first set at $10,000, was afterwards lowered to the $7,000 then being paid to circuit judges, Act of February 25, 1910, c. 62, § 1, 36 Stat. 202, 214, but before the first nominations had been received or confirmed, see 45 Cong. Rec. 2959, 4003 (1910); and, although it has since been increased, it has never been diminished.[29] After the *Bakelite* case had

[29] Under the Legislative Appropriation Act of June 30, 1932, c. 314, 47 Stat. 382—the statute under which the *Williams* and *O'Donoghue* cases arose—the judges of the Court of Customs and Patent Appeals

been decided, Congress expressly conferred tenure during good behavior upon the court's judges, in the Tariff Act of 1930, § 646, 46 Stat. 590, 762. Representative Chindblom, in supporting the measure, stated that "when this court was established it was believed to be a constitutional court [so] that it was not necessary to fix the term." 71 Cong. Rec. 2043 (1929).

The debates in the Senate at the time of the court's creation bear out this observation. See 44 Cong. Rec. 4185–4225 (1909). For under the Customs Administrative Act of 1890, c. 407, § 15, 26 Stat. 131, 138, review of decisions of the Board of General Appraisers had been vested in the Circuit Courts, undoubted Article III courts; it was this jurisdiction that was proposed to be transferred to the new court.[30] The debates accordingly concerned themselves with whether there was a need for a specialized court in the federal judicial system to deal with customs matters.

As was said some 35 years ago, "an important phase of the history of the federal judiciary deals with the movement for the establishment of tribunals whose business was to be limited to litigation arising from a restricted

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accepted a reduction in salary from $12,500 to $10,000. That court had not, however, been specified for reduction by Congress; the action of the judges was understandable coming as it did after *Bakelite* had been decided; and under § 109 of the Act, 47 Stat. 403, the Treasury was authorized to accept reductions in payment voluntarily tendered by judges whose salary was constitutionally exempt from diminution.

[30] 36 Stat. 106. Provision was made for the transfer of pending cases and of appeals from final decisions in and of the Circuit Courts and Courts of Appeals. 36 Stat. 106, 107. The very first case heard by the Court of Customs Appeals was an appeal from the Circuit Court for the Southern District of New York in *Hansen* v. *United States*, 1 Ct. Cust. App. 1; it also took jurisdiction of a case transferred from the Court of Appeals for the Ninth Circuit in *United States* v. *Seattle Brewing & Malting Co.*, 1 Ct. Cust. App. 362.

field of legislative control." Frankfurter and Landis, The Business of the Supreme Court (1927), 147. In certain areas of federal judicial business there has been a felt need to obtain, *first,* the special competence in complex, technical and important matters that comes from narrowly focused inquiry; *second,* the speedy resolution of controversies available on a docket unencumbered by other matters; and, *third,* the certainty and definition that come from nationwide uniformity of decision. See generally *id.,* at 146–186. Needs such as these provoked formation of the Commerce Court and the Emergency Court of Appeals. They also prompted establishment of the Court of Customs and Patent Appeals and its investiture with jurisdiction over customs, tariff, and patent and trademark litigation. 28 U. S. C. §§ 1541–1543.

The parallelism with the Commerce Court is especially striking. That court was created to exercise the jurisdiction previously held by the Circuit Courts to review orders of the Interstate Commerce Commission. Mann-Elkins Act of June 18, 1910, c. 309, 36 Stat. 539. It was needed, so its sponsors believed, to afford uniform, expert, and expeditious judicial review. See President Taft's message to Congress, 45 Cong. Rec. 379 (1910), in the course of which he stated:

> "Reasons precisely analogous to those which induced the Congress to create the court of customs appeals by the provisions in the tariff act of August 5, 1909, may be urged in support of the creation of the commerce court."

When disfavor with the court caused its abolition three years later, Act of October 22, 1913, c. 32, 38 Stat. 208, 219, it was decided in Congress after extensive debate that the judges then serving on it were protected in tenure by Article III, and they were thereafter assigned to sit on

other constitutional courts. See, *e. g.*, 48 Cong. Rec. 7994 (1912) (remarks of Senator Sutherland); and see *Donegan* v. *Dyson*, 269 U. S. 49.

The Emergency Court of Appeals was similarly created, by the Act of January 30, 1942, c. 26, 56 Stat. 23, to exercise exclusive equity jurisdiction to determine the validity of regulations, price schedules, and orders issued by the wartime Office of Price Administration.[31] Its Article III status was recognized in *Lockerty* v. *Phillips*, 319 U. S. 182, 187–188.

Of course the judges of those courts were appointed as judges of inferior federal courts generally, or drawn from among those previously appointed as such. See p. 538 and note 11, *supra*. But by 1942 at least, when the latter court was created, Congress was well aware of the doubt created by the *Bakelite* and *Williams* decisions whether Article III judges could sit on non-Article III tribunals. Its action in authorizing judges of the District Courts and Courts of Appeals to sit on the Emergency Court thus reflects its understanding that that court was being created under Article III.

Such an understanding parallels that of previous Congresses since the adoption of the Constitution. Congress has never been compelled to vest the entire jurisdiction provided for in Article III upon inferior courts of its creation; until 1875 it conferred very little of it indeed. See pp. 551–552, *supra*. The Court of Customs and Patent Appeals therefore fits harmoniously into the federal judicial system authorized by Article III.

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[31] Its functions were continued under the Defense Production Act of 1950, c. 932, § 408, 64 Stat. 798, 808, to determine the validity of price and wage stabilization orders issued under that Act. On April 18, 1962, after denial of certiorari in the last case on its docket, *Rosenzweig* v. *Boutin*, 369 U. S. 818, the court terminated its existence. 299 F. 2d 1–21.

VII.

Article III, § 2 provides in part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .— to Controversies to which the United States shall be a Party . . . ."

The cases heard by the Court of Claims and the Court of Customs and Patent Appeals all arise under federal law, as we have seen; they are also cases in which the United States is a party. But in *Williams* v. *United States,* 289 U. S. 553, 572–578, far from making of that circumstance a further proof that the Court of Claims exercises the judicial power contemplated by Article III, this Court held that it did not because that article, so it was said, does not make justiciable controversies to which the United States is a party *defendant.*

The Court's opinion dwelt in part upon the omission of the word "all" before "Controversies" in the clause referred to. To derive controlling significance from this semantic circumstance seems hardly to be faithful to John Marshall's admonition that "it is *a constitution* we are expounding." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407. But it would be needlessly literal to suppose that the Court rested its holding on this point. Rather it deemed controlling the rule, "well settled and understood" at the time of the Constitutional Convention, that "the sovereign power is immune from suit." 289 U. S., at 573. Accordingly it becomes necessary to reconsider whether that principle has the effect claimed of rendering suits against the United States nonjusticiable in a court created under Article III.

At least one touchstone of justiciability to which this Court has frequently had reference is whether the action sought to be maintained is of a sort "recognized at the time of the Constitution to be traditionally within the power of courts in the English and American judicial systems." *United Steelworkers* v. *United States,* 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring). There can be little doubt that that test is met here. Suits against the English sovereign by petition of liberate, *monstrans de droit,* and other forms of action designed to gain redress against unlawful action of the Crown had been developed over several centuries and were well-established before the Revolution. See 9 Holdsworth, History of English Law, 7–45 (1926). Similar provisions for judicial remedies against themselves were made by the American States immediately after the Revolution. *E. g.,* 9 Laws of Va. 536, 540 (1778) (Hening 1821); see *Higginbotham's Executrix* v. *Commonwealth,* 25 Gratt. 627, 637–638 (Va. 1874). This history was known by Congress when it established the Court of Claims, see Cong. Globe, 33d Cong., 2d Sess. 73 (1854) (remarks of Senator Pettit), and undoubtedly was familiar to the Framers of the Constitution, most of them lawyers.

Hamilton's views, quoted in the *Williams* case, 289 U. S., at 576, are not to the contrary. To be sure, Hamilton argued that "the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will." The Federalist, No. 81 (Wright ed. 1961), at 511. But that is because there was no surrender of sovereign immunity in the plan of the convention; [32] so

[32] As there was, for example, in suits between States and by the United States against a State. *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 720; *United States* v. *Texas,* 143 U. S. 621, 639–646.

that, for suits against the United States, it remained "inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" *Ibid.* (Emphasis in original.) In this sense, and only in this sense, is Article III's extension of judicial competence over controversies to which the United States is a party ineffective to confer jurisdiction over suits to which it is a defendant. For "behind the words of the constitutional provisions are postulates which limit and control." *Monaco* v. *Mississippi,* 292 U. S. 313, 322. But once the consent is given, the postulate is satisfied, and there remains no barrier to justiciability. Cf. *Cohens* v. *Virginia,* 6 Wheat. 264, 383–385.

So the Court had given itself to understand before *Williams* was decided. In *United States* v. *Louisiana,* 123 U. S. 32, 35, it held maintainable under Article III a suit brought in the Court of Claims by a State against the United States with Congress' consent. And in *Minnesota* v. *Hitchcock,* 185 U. S. 373, 384, which reaffirmed that ruling, the Court said:

> "This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause a matter of indifference whether the United States is a party plaintiff or defendant."

Further in the same opinion, 185 U. S., at 386, the Court significantly remarked:

> "While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the Court of Claims rests upon this proposition."

To deny that proposition now would be to call into question a large measure of the jurisdiction exercised by the United States District Courts. Under the Federal Tort Claims Act, § 410 (a), 60 Stat. 842, 843–844 (1946), as amended, 28 U. S. C. § 1346 (b), those courts have been empowered to determine the tort liability of the United States in suits brought by individual plaintiffs. In so doing, they exercise functions akin to those of the Court of Claims, as is evidenced by the statutory authorization of appeals to that court from their judgments, with the consent of the appellee. § 412 (a)(2), 60 Stat. 844–845 (1946), as amended, 28 U. S. C. § 1504.

In truth the District Courts have long been vested with substantial portions of the identical jurisdiction exercised by the Court of Claims. The Tucker Act, § 2, 24 Stat. 505 (1887), as amended, 28 U. S. C. § 1346 (a)(2), gives them concurrent jurisdiction over the suits it authorizes, when the amount in controversy is less than $10,000. Under that Act a District Court sits "as a court of claims," *United States* v. *Sherwood,* 312 U. S. 584, 591, and affords the same rights and privileges to suitors against the United States. *Bates Manufacturing Co.* v. *United States,* 303 U. S. 567, 571. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 109–111.

There have been and are further statutory indications that Congress regards the two courts interchangeably. In 1921, Mr. Justice Brandeis compiled a list of 17 statutes passed during World War I, permitting suits against the United States for the value of property seized for use in the war effort, and authorizing them to be instituted in either the Court of Claims or one of the District Courts. *United States* v. *Pfitsch,* 256 U. S. 547, 553 n. 1. Today, 28 U. S. C. § 1500 gives litigants an election to sue the United States as principal in the Court of Claims or to

pursue their claims against its agents in any other court, including the District Courts. See *National Cored Forgings Co.* v. *United States,* 132 Ct. Cl. 11, 132 F. Supp. 454. In addition, by the Act of September 13, 1960, §§ 1, 2 (a), 74 Stat. 912, Congress added §§ 1406 (c) and 1506 to Title 28 of the United States Code, providing for transfer between the Court of Claims and any District Court when a suit within one court's exclusive jurisdiction is brought mistakenly in another.

These evidences of congressional understanding that suits against the United States are justiciable in courts created under Article III may not be lightly disregarded. Nevertheless it is probably true that Congress devotes a more lively attention to the work performed by the Court of Claims, and that it has been more prone to modify the jurisdiction assigned to that court. It remains to consider whether that circumstance suffices to render nonjudicial the decision of claims against the United States in the Court of Claims.

First. Throughout its history the Court of Claims has frequently been given jurisdiction by special act to award recovery for breach of what would have been, on the part of an individual, at most a moral obligation. *E. g.,* 45 Stat. 602 (1928), as amended, 25 U. S. C. §§ 651–657; *Indians of California* v. *United States,* 98 Ct. Cl. 583, 599. Congress has waived the benefit of *res judicata, Cherokee Nation* v. *United States,* 270 U. S. 476, 486, and of defenses based on the passage of time, *United States* v. *Alcea Band of Tillamooks,* 329 U. S. 40, 45–46; *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155.

In doing so, as this Court has uniformly held, Congress has enlisted the aid of judicial power whose exercise is amenable to appellate review here. *United States* v. *Alcea Band of Tillamooks, supra;* see *Colgate* v. *United States,* 280 U. S. 43, 47–48. Indeed the Court has held

that Congress may for reasons adequate to itself confer bounties upon persons and, by consenting to suit, convert their moral claim into a legal one enforceable by litigation in an undoubted constitutional court. *United States* v. *Realty Co.*, 163 U. S. 427.

The issue was settled beyond peradventure in *Pope* v. *United States*, 323 U. S. 1. There the Court held that for Congress to direct the Court of Claims to entertain a claim theretofore barred for any legal reason from recovery—as, for instance, by the statute of limitations, or because the contract had been drafted to exclude such claims—was to invoke the use of judicial power, notwithstanding that the task might involve no more than computation of the sum due. Consent judgments, the Court recalled, are nonetheless judicial judgments. See 323 U. S., at 12, and cases cited. After this decision it cannot be doubted that when Congress transmutes a moral obligation into a legal one by specially consenting to suit, it authorizes the tribunal that hears the case to perform a judicial function.

Second. Congress has on occasion withdrawn jurisdiction from the Court of Claims to proceed with the disposition of cases pending therein, and has been upheld in so doing by this Court. *E. g., District of Columbia* v. *Eslin*, 183 U. S. 62. But that is not incompatible with the possession of Article III judicial power by the tribunal affected. Congress has consistently with that article withdrawn the jurisdiction of this Court to proceed with a case then *sub judice*, *Ex parte McCardle*, 7 Wall. 506; its power can be no less when dealing with an inferior federal court, *In re Hall*, 167 U. S. 38, 42. For as Hamilton assured those of his contemporaries who were concerned about the reach of power that might be vested in a federal judiciary, "it ought to be recollected that the national legislature will have ample authority to make

such *exceptions*, and to prescribe such regulations as will be calculated to obviate or remove [any] . . . inconveniences." The Federalist, No. 80 (Wright ed. 1961), at 505.

The authority is not, of course, unlimited. In 1870, Congress purported to withdraw jurisdiction from the Court of Claims and from this Court on appeal over cases seeking indemnification for property captured during the Civil War, so far as eligibility therefor might be predicated upon an amnesty awarded by the President, as both courts had previously held that it might. Despite *Ex parte McCardle, supra*, the Court refused to apply the statute to a case in which the claimant had already been adjudged entitled to recover by the Court of Claims, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. *United States* v. *Klein*, 13 Wall. 128. Surely no such concern would have been manifested if it had not been thought that the Court of Claims was invested with judicial power.[33]

VIII.

A more substantial question relating to the justiciability of money claims against the United States arises from the impotence of a court to enforce its judgments. It was Chief Justice Taney's opinion, in *Gordon* v. *United*

[33] *Pocono Pines Assembly Hotels Co.* v. *United States*, 73 Ct. Cl. 447, *leave to file petition for writ of mandamus or prohibition denied*, 285 U. S. 526, in which the Congress "remanded" a final and unappealed decision against the United States to the Court of Claims for new findings, does not detract from the authority of *Klein*. Without examining anything else, it is enough to note that the considerations governing a grant or denial of a petition for mandamus are, like those controlling the issuance of a writ of certiorari, so discretionary with the Court as to deprive a denial of precedential effect on this score. Compare Sup. Ct. Rule 30 with Rule 19 (1), (2), and cf. *Brown* v. *Allen*, 344 U. S. 443, 488, 491–492 (opinion of FRANKFURTER, J.).

States, afterwards published at 117 U. S. 697, 702, that the dependence of the Court of Claims upon an appropriation by Congress to carry its awards into effect negatived the possession of judicial power:

> "The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power."

But Taney's opinion was not the opinion of the Court. It was a memorandum of his views prepared before his death and circulated among, but not adopted by, his brethren. The opinion of the Court, correctly reported for the first time in *United States* v. *Jones,* 119 U. S. 477, 478, makes clear that its refusal to entertain the *Gordon* appeal rested solely on the revisory authority vested in the Secretary of the Treasury before the repeal of § 14. See also *United States* v. *Alire,* 6 Wall. 573, 576; *United States* v. *O'Grady,* 22 Wall. 641, 647; *Langford* v. *United States,* 101 U. S. 341, 344–345—in each of which the limitation of the *Gordon* decision to the difficulties caused by § 14 clearly appears.

Nevertheless the problem remains and should be considered. Its scope has, however, been reduced by the Act of July 27, 1956, § 1302, 70 Stat. 678, 694, 31 U. S. C. § 724a, a general appropriation act which eliminates the need for subsequent separate appropriations to pay judgments below $100,000. A judgment creditor of this order simply files in the General Accounting Office a certificate of the judgment signed by the clerk and the chief judge of the Court of Claims, and is paid. 28 U. S. C. § 2517 (a). For judgments of this dimension, therefore, there need be no concern about the issuance of execution.

For claims in excess of $100,000, 28 U. S. C. § 2518 directs the Secretary of the Treasury to certify them to Congress once review in this Court has been foregone or sought and found unavailing. This, then, is the domain

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of our problem, for Art. I, § 9, cl. 7, vests exclusive responsibility for appropriations in Congress,[34] and the Court early held that no execution may issue directed to the Secretary of the Treasury until such an appropriation has been made. *Reeside* v. *Walker,* 11 How. 272, 291.

The problem was recognized in the Congress that created the Court of Claims, where it was pointed out that if ability to enforce judgments were made a criterion of judicial power, no tribunal created under Article III would be able to assume jurisdiction of money claims against the United States. Cong. Globe, 33d Cong., 2d Sess. 113 (1854) (remarks of Senator Stuart). The subsequent vesting of such jurisdiction in the District Courts, pp. 565–566, *supra,* of course bears witness that at least the Congress has not thought such a criterion imperative.

Ever since Congress first accorded finality to judgments of the Court of Claims, it has sought to avoid interfering with their collection. Section 7 of the Act of March 3, 1863, 12 Stat. 765, 766, provided for the payment of final judgments out of general appropriations. In 1877, Congress shifted for a time to appropriating lump sums for judgments certified to it by the Secretary of the Treasury, not in order to question the judgments but to avoid the possibility that a large judgment might exhaust the prior appropriation. Act of March 3, 1877, c. 105, 19 Stat. 344, 347; see 6 Cong. Rec. 585–588 (1877). A study concluded in 1933 found only 15 instances in 70 years when Congress had refused to pay a judgment. Note, 46 Harv. L. Rev. 677, 685–686 n. 63. This historical record, surely more favorable to prevailing parties than that obtaining in private litigation, may well make us doubt whether the capacity to enforce a judgment is always indispensable for the exercise of judicial power.

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[34] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."

The Court did not think so in *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, 461–462, where the issue was the justiciability under Article III of a declaratory judgment action brought by the United States in the Court of Claims to determine its liability for payment of an award procured by the defendant from an international arbitral commission assertedly through fraud. See also *Nashville, C. & St. L. R. Co.* v. *Wallace,* 288 U. S. 249, 263. Nor has it thought so when faced with the exactly analogous problem presented by suits for money between States in the original jurisdiction. That jurisdiction has been upheld, for example, in *South Dakota* v. *North Carolina,* 192 U. S. 286, 318–321, notwithstanding the Court's recognition of judicial impotence to compel a levy of taxes or otherwise by process to enforce its award. See especially the opinions of Chief Justice Fuller and Chief Justice White at the beginning and inconclusive end of the extended litigation between Virginia and West Virginia, 206 U. S. 290, 319 (1907) and 246 U. S. 565 (1918), in which the Court asserted jurisdiction to award damages for breach of contract despite persistent and never-surmounted challenges to its power to enforce a decree.[35] If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States. We conclude that the presence of the United States as a party defendant to suits maintained in the Court of Claims and the Court of Customs and Patent Appeals does not debar those courts from exercising the judicial power provided for in Article III.

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[35] See also the intervening opinions and dispositions: 209 U. S. 514; 220 U. S. 1, 36; 222 U. S. 17, 19–20; 231 U. S. 89; 234 U. S. 117; 238 U. S. 202; 241 U. S. 531.

IX.

All of the business that comes before the two courts is susceptible of disposition in a judicial manner. What remains to be determined is the extent to which it is in fact disposed of in that manner.

A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in *United States* v. *Sherwood*, 312 U. S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in *Sherwood, ibid.*, from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the Seventh Amendment. *McElrath* v. *United States*, 102 U. S. 426, 439–440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211; see 74 Harv. L. Rev. 414, 415 (1960).[36]

The principal question raised by the parties under this head of the argument is whether the matters referred by Congress to the Court of Claims and the Court of Customs and Patent Appeals are submitted to them in a form consonant with the limitation of judicial power to "cases or

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[36] The provision in 28 U. S. C. § 2503 for Commissioners to take evidence and make preliminary rulings is conformable in all respects with the practice of masters in chancery. For the judicial quality of the proceedings, see the Revised Rules of the Court of Claims, effective December 2, 1957, 140 Ct. Cl. II, 28 U. S. C. App., p. 5237, as amended, *id.* (Supp. III), p. 863.

controversies" imposed by Article III. We may consider first the bulk of jurisdiction exercised by the two courts, reserving for separate treatment in the next section of this opinion two areas which may reasonably be regarded as presenting special difficulty.

"Whether a proceeding which results in a grant is a judicial one," said Mr. Justice Brandeis for a unanimous Court, "does not depend upon the nature of the thing granted, but upon the nature of the proceeding which Congress has provided for securing the grant. The United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted. It may give to the individual the option of either an administrative or a legal remedy. Or it may provide only a legal remedy. [See pp. 549–552, *supra.*] Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun* v. *United States,* 270 U. S. 568, 576–577. (Citations omitted.)

It is unquestioned that the Tucker Act cases assigned to the Court of Claims, 28 U. S. C. § 1491, advance to judgment "according to the regular course of legal procedure." Under this grant of jurisdiction the court hears tax cases, cases calling into question the statutory authority for a regulation, controversies over the existence or extent of a contractual obligation, and the like. See generally Schwartz and Jacoby, Government Litigation (tentative ed. 1960), 131–223. Such cases, which account for as much as 95% of the court's work,[37] form the staple

[37] In 1950, Tucker Act cases constituted 2,350 of the 2,472 proceedings conducted by the court. Wilkinson, The United States Court of Claims, 36 A. B. A. J. 89, 159 (1950). The percentage may

judicial fare of the regular federal courts. There can be no doubt that, to the "expert feel of lawyers," *United Steelworkers* v. *United States*, 361 U. S. 39, 44, 60 (FRANKFURTER, J., concurring), they constitute cases or controversies.

The balance of the court's jurisdiction to render final judgments may likewise be assimilated to the traditional business of courts generally. Thus the court has been empowered to render accountings,[38] to decide if debts[39] or penalties[40] are due the United States, and to determine the liability of the United States for patent or copyright infringement[41] and for other specially designated torts.[42] In addition, it has been given jurisdiction to review, on issues of law including the existence of substantial evidence, decisions of the Indian Claims Commission.[43] Each of these cases, like those under the Tucker Act, is contested, is concrete, and admits of a decree of a sufficiently conclusive character. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240–241.

The same may undoubtedly be said of the customs jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1541.[44] Contests over classifi-

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well have been augmented since that time by the extension of Tucker Act jurisdiction to Indian claims accruing after August 13, 1946. 28 U. S. C. § 1505, added by 63 Stat. 102 (1949).

[38] 28 U. S. C. § 1494 (contractors or their sureties); 28 U. S. C. §§ 1496, 2512 (disbursing officers).

[39] R. S. § 5261 (1878), as amended, 45 U. S. C. § 87 (government-aided railroads).

[40] 28 U. S. C. § 1499 (violations of the Eight-Hour Law, 37 Stat. 137 (1912), as amended, 40 U. S. C. § 324).

[41] 28 U. S. C. (Supp. III) § 1498.

[42] 28 U. S. C. §§ 1495, 2513 (wrongful imprisonment); 28 U. S. C. § 1497 (trespass to oyster beds).

[43] 60 Stat. 1049, 1054 (1946), 25 U. S. C. § 70s.

[44] 42 Stat. 15 (1921), as amended, 19 U. S. C. § 169, makes 28 U. S. C. § 1541 applicable as well to the antidumping statute. See also 46 Stat. 735 (1930), as amended, 19 U. S. C. § 1516 (b), (c),

cation and valuation of imported merchandise have long been maintainable in inferior federal courts. Under R. S. § 3011 (1878), suits after protest against the collector were authorized in the circuit courts. *E. g., Greely's Administrator* v. *Burgess,* 18 How. 413; *Iasigi* v. *The Collector,* 1 Wall. 375. When the Customs Administrative Act of 1890 was passed, c. 407, 26 Stat. 131, repealing that section and creating a Board of General Appraisers to review determinations of the collector, a further right of review was provided in the Circuit Courts. See *De Lima* v. *Bidwell,* 182 U. S. 1, 175. This Court took unquestioned appellate jurisdiction from those courts on numerous occasions. *E. g., United States* v. *Ballin,* 144 U. S. 1; *Hoeninghaus* v. *United States,* 172 U. S. 622. It has continued to accept review by certiorari from the Court of Customs Appeals since the jurisdiction of the Circuit Courts was transferred to it in 1909. *E. g., Five Per Cent. Discount Cases,* 243 U. S. 97; *Barr* v. *United States,* 324 U. S. 83. That the customs litigation authorized by § 1541 conforms to conventional notions of case or controversy seems no longer open to doubt.

Doubt has been expressed, however, about the jurisdiction conferred by 28 U. S. C. § 1542 and 60 Stat. 435 (1946), as amended, 15 U. S. C. § 1071, to review application and interference proceedings in the Patent Office relative to patents and trademarks. Parties to those proceedings are given an election to bring a civil action to contest the Patent Office decision in a District Court under 35 U. S. C. §§ 145, 146, or to seek review in the Court of Customs and Patent Appeals under 35 U. S. C. § 141. If the latter choice is made, the Court confines its review to the evidence adduced before the Patent

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permitting classification or valuation cases to be initiated by protest from a competing domestic manufacturer, after which the importer's consignee may be made a party to suit in the Customs Court, with appeal to the Court of Customs and Patent Appeals.

Office and to the questions of law preserved by the parties; its decision "shall be entered of record in the Patent Office and govern the further proceedings in the case." 35 U. S. C. § 144. The codification "omitted as superfluous" the last sentence in the existing statute: "But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." Act of July 8, 1870, c. 230, § 50, 16 Stat. 198, 205; see Reviser's Note to 35 U. S. C. § 144.

The latter provision was evidently instrumental in prompting a decision of this Court, at a time when review of Patent Office determinations was vested in the Court of Appeals for the District of Columbia, that the ruling called for by the statute was not of a judicial character. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 699. That is the most that the *Postum* holding can be taken to stand for, as *United States* v. *Duell*, 172 U. S. 576, 588–589, had upheld the judicial nature of the review in all other respects.[45] And the continuing vitality of the decision even to this extent has been seriously weakened if not extinguished by the subsequent holding in *Hoover Co.* v. *Coe*, 325 U. S. 79, 88, sustaining the justiciability of the alternative remedy by civil action even though the Court deemed "the effect of adjudication in equity the same as that of decision on appeal." See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals: Patent Office and Tariff Commission Cases, 18 G. W. L. Rev. 192, 194–198 (1950).

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[45] Curiously, *Duell* was not cited in *Postum*, while the cases that were—*Frasch* v. *Moore*, 211 U. S. 1; *Atkins* v. *Moore*, 212 U. S. 285; *Baldwin Co.* v. *Howard Co.*, 256 U. S. 35—had, as the Court recognized, held only that the statutory scheme of review did not produce a "final judgment" as required by the statute then governing appeals to the Court.

At the time when *Postum* was decided, the proceeding in equity against the Patent Office was cumulative rather than alternative with the review by appeal, and it seems likely that it was this feature of the statute which caused the Court to characterize the judgment of the Court of Appeals as "a mere administrative decision." 272 U. S., at 698. Thereafter Congress made the remedies alternative, Act of March 2, 1927, c. 273, § 11, 44 Stat. 1335, 1336, and it was this amended jurisdiction that it later transferred to the Court of Customs and Patent Appeals, renaming the court in the process. Act of March 2, 1929, c. 488, 45 Stat. 1475.

It may still be true that Congress has given to the equity proceeding a greater preclusive effect than that accorded to decisions of the Court of Customs and Patent Appeals.[46] Even so, that circumstance alone is insufficient to make those decisions nonjudicial. *Tutun* v. *United States,* 270 U. S. 568, decided by the same Court as *Postum* and not there questioned, is controlling authority. For the Court there held that a naturalization proceeding in a Federal District Court was a "case" within the meaning of Article III, even though the Government was empowered by statute [47] to bring a later bill in equity for cancellation of the certificate.

Mr. Justice Brandeis, the author of the *Tutun* opinion, had also prepared the Court's opinion in *United States* v. *Ness,* 245 U. S. 319, which upheld the Government's right to seek denaturalization even upon grounds known to and

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[46] See Stern and Gressman, Supreme Court Practice (1950), 44–46. But see *Hobart Mfg. Co.* v. *Landers, Frary & Clark,* 26 F. Supp. 198, 202, aff'd *per curiam,* 107 F. 2d 1016; *Battery Patents Corp.* v. *Chicago Cycle Supply Co.,* 111 F. 2d 861, 863; Reviser's Note, 35 U. S. C. § 144.

[47] Naturalization Act of June 29, 1906, c. 3592, § 15, 34 Stat. 596, 601.

asserted unsuccessfully by it in the naturalization court.[48] Proceedings in that court, the opinion explained, were relatively summary, with no right of appeal, whereas the denaturalization suit was plenary enough to permit full presentation of all objections and was accompanied with appeal as of right. 245 U. S., at 326. These differences made it reasonable for Congress to allow the Government another chance to contest the applicant's eligibility.

The decision in *Tutun*, coming after *Ness*, draws the patent and trademark jurisdiction now exercised by the Court of Customs and Patent Appeals fully within the category of cases or controversies. So much was recognized in *Tutun* itself, 270 U. S., at 578, where Mr. Justice Brandeis observed:

> "If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. 'It is in this respect,' as stated in *Johannessen* v. *United States*, 225 U. S. 227, 238, 'closely analogous to a public grant of land (Rev. Stat., § 2289, etc.,) or of *the exclusive right to make, use and vend a new and useful invention* (Rev. Stat., § 4883, etc.).'" (Emphasis added.)

Like naturalization proceedings in a District Court, appeals from Patent Office decisions under 35 U. S. C. § 144 are relatively summary—since the record is limited to the evidence allowed by that office—and are not themselves subject to direct review by appeal as of right.[49] It

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[48] For later developments, see *Schneiderman* v. *United States*, 320 U. S. 118, 123–125; *Knauer* v. *United States*, 328 U. S. 654, 671–673; *Chaunt* v. *United States*, 364 U. S. 350.

[49] We intimate no opinion whether 28 U. S. C. § 1256 was intended by Congress to make patent and trademark cases reviewable by certiorari in this Court. See Kurland and Wolfson, Supreme Court Review of the Court of Customs and Patent Appeals, 18 G. W. L. Rev. 192, 194–198 (1950).

was as reasonable for Congress, therefore, to bind only the Patent Office on appeals and to give private parties whether or not participants in such appeals a further opportunity to contest the matter on plenary records developed in litigation elsewhere. This practice but furnishes a further illustration of the specialized jurisdiction of the Court of Customs and Patent Appeals, akin to that of the Commerce Court, in passing upon the consistency with law of expert administrative judgments without undertaking to conclude private parties in nonadministrative litigation. We conclude that the *Postum* decision must be taken to be limited to the statutory scheme in existence before the transfer of patent and trademark litigation to that court.

X.

We turn finally to the more difficult questions raised by the jurisdiction vested in the Court of Customs and Patent Appeals by 28 U. S. C. § 1543 to review Tariff Commission findings of unfair practices in import trade, and the congressional reference jurisdiction given the Court of Claims by 28 U. S. C. §§ 1492 and 2509. The judicial quality of the former was called into question though not resolved in *Ex parte Bakelite Corp.*, 279 U. S. 438, 460–461,[50] while that of the latter must be taken to have been adversely decided, so far as susceptibility to Supreme Court review is concerned, by *In re Sanborn*, 148 U. S. 222.[51]

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[50] Section 316 (c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 943, involved in *Bakelite*, was reenacted in virtually identical terms by § 337 (c) of the Tariff Act of 1930, 46 Stat. 590, 703, as amended, 19 U. S. C. § 1337 (c).

[51] *Sanborn* involved the departmental reference jurisdiction of the Court of Claims, since repealed by 67 Stat. 226 (1953); but the functions performed by the court in that case were not in substance different from those it still performs on request by Congress.

At the outset we are met with a suggestion by the Solicitor General that even if the decisions called for by these heads of jurisdiction are nonjudicial, their compatibility with the status of an Article III court has been settled by *O'Donoghue* v. *United States,* 289 U. S. 516, 545–548. It is true that *O'Donoghue* upheld the authority of Congress to invest the federal courts for the District of Columbia with certain administrative responsibilities—such as that of revising the rates of public utilities [52]—but only such as were related to the government of the District. See *Pitts* v. *Peak,* 60 App. D. C. 195, 197, 50 F. 2d 485, 487, cited and relied upon in *O'Donoghue,* 289 U. S., at 547–548.[53] To extend that holding to the wholly nationwide jurisdiction of courts whose seat is in the District of Columbia would be to ignore the special importance attached in the *O'Donoghue* opinion to the need there for an independent national judiciary.

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[52] See *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428.

[53] *Federal Radio Comm'n* v. *General Electric Co.,* 281 U. S. 464, which sustained the authority of the Court of Appeals for the District of Columbia to render an "administrative" decision respecting the issuance of a radio broadcasting license to a station in Schenectady, New York, was decided at a time when the courts of the District were regarded wholly as legislative courts. *Id.,* at 468.

It is significant that all of the jurisdiction at issue in the *Keller, Postum,* and *General Electric* cases has long since been transformed into judicial business. The change with respect to review of Patent Office decisions took place, as we have seen, p. 577, *supra,* before the transfer of that jurisdiction to the Court of Customs and Patent Appeals. Review of the Public Utilities Commission was restricted to questions of law upon the evidence before the Commission, in the Act of August 27, 1935, § 2, 49 Stat. 882, D. C. Code, 1961, § 43–705. See *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 458. And the Act of July 1, 1930, c. 788, 46 Stat. 844, likewise made review of the Radio Commission judicial, as was recognized in *Federal Radio Comm'n* v. *Nelson Bros. Co.,* 289 U. S. 266, 274–278.

The restraints of federalism are, of course, removed from the powers exercisable by Congress within the District. For, as the Court early stated, in *Kendall* v. *United States,* 12 Pet. 524, 619:

> "There is in this district, no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice."

Thus those limitations implicit in the rubric "case or controversy" that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts, see Madison's Notes of the Debates, in II Farrand, Records of the Federal Convention (1911), 45–46, need have no application in the District. The national courts here may, consistently with those limitations, perform any of the local functions elsewhere performed by state courts.[54]

But those are not the only limitations embodied in Article III's restriction of judicial power to cases or con-

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[54] The D. C. Code, 1961, Tit. 11, c. 5, establishes a special term of the United States District Court as a probate court, whereas the other Federal District Courts have been debarred from exercising such a jurisdiction as one traditionally within the domain of the States. *Byers* v. *McAuley,* 149 U. S. 608, 619. Similarly, the divorce proceedings maintainable under the general jurisdictional grant, D. C. Code, § 11–306; see *Bottomley* v. *Bottomley,* 104 U. S. App. D. C. 311, 262 F. 2d 23, are beyond the ken of the federal courts in the States. *Ohio ex rel. Popovici* v. *Agler,* 280 U. S. 379, 383.

The appointing authority given judges of the District Court to select members of the Board of Education and of the Commission on Mental Health, D. C. Code, §§ 31–101, 21–308, is probably traceable to Art. II, § 2 of the Constitution. See note 10, *supra; Ex parte Siebold,* 100 U. S. 371, 397–398.

troversies. The restriction expresses as well the Framers' desire to safeguard the independence of the judicial from the other branches by confining its activities to "cases of a Judiciary nature," see II Farrand, *op cit., supra,* at 430, and in this respect it remains fully applicable at least to courts invested with jurisdiction solely over matters of national import. Our question is whether the independence of either the Court of Claims or the Court of Customs and Patent Appeals has been so compromised by its investiture with the particular heads of jurisdiction described above as to destroy its eligibility for recognition as an Article III court.

The jurisdictional statutes in issue, § 337 of the Tariff Act of 1930 and 28 U. S. C. §§ 1492, 2509, appear to subject the decisions called for from those courts to an extrajudicial revisory authority incompatible with the limitations upon judicial power this Court has drawn from Article III. See, *e. g., Chicago & Southern Air Lines, Inc.,* v. *Waterman S. S. Corp.,* 333 U. S. 103, 113–114; *Hayburn's Case,* 2 Dall. 409. Whether they actually do so is not, however, entirely free from difficulty, and cannot in our view appropriately be decided in a vacuum, apart from the setting of particular cases in which we may gauge the operation of the statutes. For disposition of the present cases, we think it is sufficient simply to note the doubt attending the validity of the jurisdiction, and to proceed on the assumption that it cannot be entertained by an Article III court.

It does not follow, however, from the invalidity, actual or potential, of these heads of jurisdiction, that either the Court of Claims or the Court of Customs and Patent Appeals must relinquish entitlement to recognition as an Article III court. They are not tribunals, as are for example the Interstate Commerce Commission or the Federal Trade Commission, a substantial and integral part of whose business is nonjudicial.

The overwhelming majority of the Court of Claims' business is composed of cases and controversies. See pp. 573–574, *supra*. In the past year, it heard only 10 reference cases, Annual Report of the Administrative Office of the United States Courts (1961), 318; and its recent annual average has not exceeded that figure, Pavenstedt, The United States Court of Claims as a Forum for Tax Cases, 15 Tax L. Rev. 1, 6 n. 23 (1959). The tariff jurisdiction of the Court of Customs and Patent Appeals is of even less significant dimensions. In the past fiscal year, that court disposed of 41 customs cases and 112 patent or trademark cases, but heard no appeals from the Tariff Commission. Annual Report of the Administrative Office of the United States Courts (1961), 318. Indeed we are advised that in all the years since 1922, when the predecessor to § 337 of the Tariff Act was first enacted, the Court of Customs and Patent Appeals has entertained only six such cases.[55] Certainly the status of a District Court or Court of Appeals would not be altered by a mere congressional attempt to invest it with such insignificant nonjudicial business; it would be equally perverse to make the status of these courts turn upon so minuscule a portion of their purported functions.

The Congress that enacted the assignment statute with its accompanying declarations was apprised of the possibility that a re-examination of the *Bakelite* and *Williams* decisions might lead to disallowance of some of these courts' jurisdiction. See 99 Cong. Rec. 8944 (1953) (remarks of Senator Gore); 104 Cong. Rec. 17549 (1958) (remarks of Senator Talmadge). Nevertheless it chose to pass the statute. We think with it that, if necessary, the particular offensive jurisdiction, and not the courts, would fall.

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[55] Brief on behalf of the chief judge and the associate judges of the United States Court of Customs and Patent Appeals as *amici curiae*, p. 10.

CONCLUSIONS.

Since the Court of Claims and the Court of Customs and Patent Appeals are courts created under Article III, their judges—including retired judges, *Booth* v. *United States,* 291 U. S. 339, 350–351—are and have been constitutionally protected in tenure and compensation. Our conclusion, it should be noted, is not an *ex post facto* resurrection of a banished independence. The judges of these two courts have never accepted the dependent status thrust at them by the *Bakelite* and *Williams* decisions. See, *e. g.,* Judge Madden writing for the Court of Claims in *Pope* v. *United States,* 100 Ct. Cl. 375, 53 F. Supp. 570, rev'd, 323 U. S. 1. The factors set out at length in this opinion, which were not considered in the *Bakelite* and *Williams* opinions, make plain that the differing conclusion we now reach does no more than confer legal recognition upon an independence long exercised in fact.

That recognition suffices to dispose of the present cases. For it can hardly be contended that the specialized functions of these judges deprive them of capacity, as a matter of due process of law, to sit in judgment upon the staple business of the District Courts and Courts of Appeals. Whether they should be given such assignments may be and has been a proper subject for congressional debate, *e. g.,* 62 Cong. Rec. 190–191, 207–209 (1921), but once legislatively resolved it can scarcely rise to the dignity of a constitutional question. To be sure, a judge of specialized experience may at first need to devote extra time and energy to familiarize himself with criminal, labor relations, or other cases beyond his accustomed ken. But to elevate this temporary disadvantage into a constitutional disability would be tantamount to suggesting that the President may never appoint to the bench a lawyer whose life's practice may have been devoted to patent, tax, antitrust, or any other specialized

field of law in which many eminently well-qualified lawyers are wont to engage. The proposition will not, of course, survive its statement.

The judgments of the Courts of Appeals are

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, with whom THE CHIEF JUSTICE joins, concurring in the result.

I cannot agree to the unnecessary overruling of *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), and *Williams* v. *United States*, 289 U. S. 553 (1933). Both were unanimous opinions by most distinguished Courts,[1] headed in the *Bakelite* case by Chief Justice Taft and in *Williams* by Chief Justice Hughes.

Long before *Glidden* v. *Zdanok* was filed, the Congress had declared the Court of Claims "to be a court established under article III of the Constitution of the United States." Act of July 28, 1953, § 1, 67 Stat. 226. Not that this *ipse dixit* made the Court of Claims an Article III court, for it must be examined in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges. But the 1953 Act did definitely establish the intent of the Congress, which prior to that time was not clear in light of the *Williams* holding 20 years earlier that it was not an Article III court.

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[1] *Bakelite:* Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford and Stone. *Williams:* Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts and Cardozo.

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It is my belief that prior to 1953 the Court of Claims had all of the characteristics of an Article III court—jurisdiction over justiciable matters, issuance of final judgments, judges appointed by the President with consent of the Senate—save as to the congressional reference matters. It was the fact that a substantial portion of its jurisdiction consisted of congressional references that compelled the decision in *Williams* that it was not an Article III court and therefore the salaries of its judges could be reduced.[2] Since that time the Article III jurisdiction of the Court of Claims has been enlarged by including original jurisdiction under several Acts, *e. g.*, suits against the United States for damages for unjust conviction, Act of May 24, 1938, §§ 1–4, 52 Stat. 438, 28 U. S. C. § 1495, and appellate jurisdiction over tort suits against the United States tried in the District Courts, Act of Aug. 2, 1946, § 412 (a)(2), 60 Stat. 844, 28 U. S. C. § 1504, and over suits before the Indian Claims Commission, Act of May 24, 1949, § 89 (a), 63 Stat. 102, 28 U. S. C. § 1505. In addition, the former jurisdiction over questions referred by the Executive branch was withdrawn in 1953. Act of July 28, 1953, § 8, 67 Stat. 226. The result is that practically all of the court's jurisdiction

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[2] " 'From the outset Congress has required it [the Court of Claims] to give merely advisory decisions on many matters. Under the act creating it all of its decisions were to be of that nature. Afterwards some were to have effect as binding judgments, but others were still to be merely advisory. This is true at the present time.' " *Williams* v. *United States, supra,* at 569 (quoting from *Ex parte Bakelite*).

"Further reflection tends only to confirm the views expressed in the *Bakelite* opinion . . . and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims." *Williams,* at 571. The *Bakelite* decision was posited squarely on the legislative reference function. See *Ex parte Bakelite, supra,* 454–458.

is now comprised of Article III cases. And I read the 1953 Act as unequivocally expressing Congress' intent that this court—the jurisdiction of which was then almost entirely over Article III cases—should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

It is true that Congress still makes legislative references to the court, averaging some 10 a year. The acceptance of jurisdiction of either executive or legislative references calling for advisory opinions has never been honored by Article III courts. Indeed, this Court since 1793 has consistently refused so to act. Correspondence of the Justices, 3 Johnston, Correspondence and Public Papers of John Jay (1891), 486–489. *Muskrat* v. *United States,* 219 U. S. 346 (1911). I do not construe the legislative history of the 1953 Act to be so clear as to require the Court of Claims to carry on this function, which appears to be minuscule. On the contrary, the congressional mandate clearly and definitely declared the court "to be a court established under article III." I would carry out that mandate. In my view the Court of Claims, if and when such a reference occurs, should with due deference advise the Congress, as this Court advised the President 169 years ago, that it cannot render advisory opinions.

Likewise I find that the Court of Customs and Patent Appeals has been an Article III court since 1958. It was created by the Congress in 1909 to exercise exclusive appellate jurisdiction over customs cases. Payne-Aldrich Tariff Act of Aug. 5, 1909, 36 Stat. 11, 105–108. At that time these cases were reviewed by Circuit Courts of Appeals—clearly of Article III status—36 Stat. 106, and they have since been considered on certiorari by this Court without suggestion that they were not "cases" in the Article III sense. *E. g., The Five Per Cent. Discount*

Cases, 243 U. S. 97 (1917).[3] The Congress enlarged the jurisdiction of the Court of Customs and Patent Appeals in 1922 to include appeals on questions of law from Tariff Commission findings in proceedings relating to unfair practices in the import trade. Tariff Act of 1922, 42 Stat. 943, 944. In 1929 this Court in *Bakelite*, *supra*, which involved a tariff matter, found these references to be of an advisory nature and on this basis declared the Court of Customs and Patent Appeals to be a legislative rather than an Article III court. The *Bakelite* decision indicates that this Court was of the impression that the tariff jurisdiction of the Court of Customs and Patent Appeals would be significant. However, since that time that court has handled but four such references—and only one in the last 27 years. At about the same time that the *Bakelite* opinion came down, Congress transferred the appellate jurisdiction in patent and trademark cases from the Court of Appeals of the District of Columbia to the Court of Customs and Patent Appeals. Act of March 2, 1929, §§ 1, 2, 45 Stat. 1475. Thus, contrary to the apparent assumption in *Bakelite*, the business of that court now consists exclusively of Article III cases—with tariff references practically nonexistent (one in the last 27 years). In view of this evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such. Act of Aug. 25, 1958, § 1, 72 Stat. 848.

As I have indicated, *supra*, the handling of the tariff references—numbering only 6 in 40 years—is not an Article III court function. The Congress has declared

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[3] That its original jurisdiction was in "cases" in the Article III, § 2, sense cannot be questioned. See *In re Frischer & Co.*, 16 Ct. Cust. App. 191, 198 (1928); *Osborn* v. *Bank of U. S.*, 9 Wheat. 738, 819 (1824); *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 487 (1894); *Tutun* v. *United States*, 270 U. S. 568, 576–577 (1926).

the Court of Customs and Patent Appeals to be an Article III court. It should, therefore, if and when such a case arose, with due deference refuse to exercise such jurisdiction.[4]

I see nothing in the argument that the 1953 and 1958 Acts so changed the character of these courts as to require new presidential appointments. Congress was merely renouncing its power to terminate the functions or reduce the tenure or salary of the judges of the courts. Much more drastic changes have been made without reappointment.[5] And there is no significance to the fact that Judge Jackson, who presided over the Lurk trial, was not in active status in 1958 when Congress declared his court to be an Article III court. He remained in office as a judge of that court even though retired, cf. *Booth* v. *United States,* 291 U. S. 339 (1934), and his judgeship was controlled by any act concerning the jurisdiction of that court or the status of its judges.

I would affirm.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment on the Court of Appeals in No. 242 and

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[4] The validity of Judge Jackson's participation, as the Government points out, might also be sustained under the Act of September 14, 1922, c. 306, § 5, 42 Stat. 837, 839, which provided for the assignment of judges of the Court of Customs Appeals to the courts of the District of Columbia. This Act was on the books when Judge Jackson took his seat on the Court of Customs and Patent Appeals as well as when the *Lurk* case was tried.

[5] Nor does my holding carry any implication that judgments entered prior to the date of these Acts in which judges of these courts participated might be collaterally attacked. *Ex parte Ward,* 173 U. S. 452 (1899).

on the District Court [1] in No. 481. The problem is an impersonal one, concerning the differences between an Article I court and an Article III court. My Brother HARLAN calls it a problem of a "highly theoretical nature." Far from being "theoretical" it is intensely practical, for it deals with powers of judges over the life and liberty of defendants in criminal cases and over vast property interests in complicated trials customarily involving the right to trial by jury.

Prior to today's decision the distinction between the two courts had been clear and unmistakable. By Art. I, § 8, Congress is given a wide range of powers, including

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[1] The District Court of the District of Columbia, like the "inferior courts" established by Congress under Art. III, § 1, of the Constitution, is an Article III court (*O'Donoghue* v. *United States*, 289 U. S. 516), even though it possesses powers that Article III courts could not exercise. Congress, acting under its plenary power granted by Art. I, § 8, to legislate for the District of Columbia, has from time to time vested in the courts of the District administrative and even legislative powers. See, *e. g.*, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 440–443 (review of rate making); *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, 698–701 (patent and trademark appeals); *Federal Radio Comm'n* v. *General Electric Co.*, 281 U. S. 464, 467–468 (review of radio station licensing; cf. *Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 274–278). Congress has also authorized District Court judges to appoint members of the Board of Education. D. C. Code, § 31–101.

In *O'Donoghue* v. *United States*, *supra*, at 545, the Court said:

"The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state."

The eighteenth-century courts in this country performed many administrative functions. See Pound, Organization of Courts (1940), pp. 88–89. The propriety of the union of legislative and judicial powers in a *state* court was assumed in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210.

the power "to pay the Debts" of the United States and the power to "lay and collect Taxes, Duties, Imposts and Excises." By Art. I, § 8, Congress is also given the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Pursuant to the latter—the Necessary and Proper Clause—the Court of Claims was created "to pay the Debts"; [2] and the Court of Customs and Patent Appeals was created in furtherance of the collection of duties. My Brother HARLAN shows that the Court of Customs Appeals traces back to the Payne-Aldrich Tariff Act of August 5, 1909, which should be proof enough that it is an administrative court, performing essentially an executive task.[3]

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[2] "Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

"Conspicuous among such matters are claims against the United States. These may arise in many ways and may be for money, lands or other things. They all admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts; but no court can have cognizance of them except as Congress makes specific provision therefor. Nor do claimants have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them.

"The Court of Claims is such a court. It was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States. But the function is one which Congress has a discretion either to exercise directly or to delegate to other agencies." *Ex parte Bakelite Corp.*, 279 U. S. 438, 451–452.

[3] "The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports and to adopt any

In *Williams* v. *United States*, 289 U. S. 553, the Court in a unanimous decision written by Mr. Justice Sutherland held that the Court of Claims, though exercising judicial power, was an Article I court. And in *Ex parte Bakelite Corp.*, 279 U. S. 438, the Court in a unanimous opinion written by Mr. Justice Van Devanter held the Court of Customs Appeals to be an Article I court. Taft was Chief Justice when *Ex parte Bakelite* was decided. Hughes was Chief Justice when *Williams* v. *United States* was decided. I mention the two regimes that filed the unanimous opinions in those cases to indicate the vintage of the authority which decided them. Their decisions, of course, do not bind us, for they dealt with matters of constitutional interpretation which are always open. Yet no new history has been unearthed to show that the Taft and the Hughes Courts were wrong on the technical, but vitally important, question now presented.

Mr. Justice Van Devanter in *Ex parte Bakelite* marked the line between the Court of Claims and the Court of

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appropriate means of carrying that power into execution. The full province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. These matters are brought before it by appeals from decisions of the Customs Court, formerly called the Board of General Appraisers. The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers. True, the provisions of the customs laws requiring duties to be paid and turned into the Treasury promptly, without awaiting disposal of protests against rulings of appraisers and collectors, operate in many instances to convert the protests into applications to refund part or all of the money paid; but this does not make the matters involved in the protests any the less susceptible of determination by executive officers. In fact their final determination has been at times confided to the Secretary of the Treasury, with no recourse to judicial proceedings." *Ex parte Bakelite Corp.*, *supra*, note 2, at 458.

Customs and Patent Appeals on the one hand and the District Courts and Courts of Appeals on the other:

> "Those established under the specific power given in section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior." *Id.*, at 449.

My Brother HARLAN emphasizes that both Judge Madden of the Court of Claims and Judge Jackson of the Court of Customs and Patent Appeals "enjoy statutory assurance of tenure and compensation"; and so they do. But that statement reveals one basic difference between an Article III judge and an Article I judge. The latter's tenure is *statutory* and *statutory only;* Article I contains no guarantee that the judges of Article I courts have life appointments. Nor does it provide that their salaries may not be reduced during their term of office. On the other hand, the tenure of an Article III judge is during "good behaviour"; moreover, Article III provides that its judges shall have a compensation that "shall not be diminished during their Continuance in Office." See *O'Malley* v. *Woodrough,* 307 U. S. 277. To repeat, there is not a word in Article I giving its courts such protection in tenure or in salary. A constitutional amendment would be necessary to supply Article I judges with the guaran-

tees of tenure and salary that Article III gives its judges. The majority attempts to evade this problem by looking to so-called "Congressional intent" to find the creation of an Article III court. Congress, however, has always understood that it was only establishing Article I courts when it created the Court of Claims and the Court of Customs and Patent Appeals. The tenure it affixed to the judges of those tribunals was of necessity statutory only, as no mandate or requirement of Article I was involved.

The importance of these provisions to the independence of the judiciary needs no argument. Hamilton stated the entire case in The Federalist No. 79 (Lodge ed. 1908), pp. 491–493:

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter. The enlightened friends to good government in every State, have seen cause to lament the want of precise and explicit precautions in the State constitutions on this head. Some of these indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite. The plan of the convention accordingly has provided that the judges of

the United States 'shall at *stated times* receive for their services a compensation which shall not be *diminished* during their continuance in office.'

"This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant to-day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so as never to lessen the allowance with which any particular judge comes into office, in respect to him. . . .

"This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the States in regard to their own judges.

"The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and

disqualified for holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."

We should say here what was said in *Toth* v. *Quarles*, 350 U. S. 11, 17:

". . . the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

Tenure that is guaranteed by the Constitution is a badge of a judge of an Article III court. The argument that mere *statutory* tenure is sufficient for judges of Article III courts was authoritatively answered in *Ex parte Bakelite Corp., supra,* at 459–460:

". . . the argument is fallacious. It mistakenly assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred. Nor has there been any settled practice on the part of Congress which gives special significance to the absence or presence of a provision respecting the tenure of judges. This may be illustrated by two citations. *The same Congress that created the Court of Customs Appeals made provision for five additional circuit judges and declared that they should*

> *hold their offices during good behavior; and yet the status of the judges was the same as it would have been had that declaration been omitted.* In creating courts for some of the Territories Congress failed to include a provision fixing the tenure of the judges; but the courts became legislative courts just as if such a provision had been included." (Italics added.)

Congress could make members of the Interstate Commerce Commission lifetime appointees. Yet I suppose no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals. But if any agency member is disqualified, why is a member of another Article I tribunal, *viz.*, the Court of Claims or the Court of Customs and Patent Appeals, qualified? No distinction can be drawn based on the functions performed by the Interstate Commerce Commission and those performed by the other two legislative tribunals. In each case some adjudicatory functions are performed.[4] Though the judicial functions of the Interstate Commerce Commission are as distinct as those of the Court of Claims, they nevertheless derive from Article I; and they are functions that Congress can exercise directly or delegate to an agency. *Williams* v. *United States, supra,* pp. 567–571. To make the present decision turn on whether the Court of Claims and the Court of Customs and Patent Appeals perform "judicial" functions is to adopt a false standard. The manner in which the majority reasons exposes the fallacy.

The majority says that once the United States consents to be sued all problems of "justiciability" are satisfied; and

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[4] The Interstate Commerce Commission has long entered reparation orders directing carriers to pay shippers specified sums of money plus interest for excessive and unreasonable rates. See *Meeker* v. *Lehigh Valley R. Co.*, 236 U. S. 434; II Sharfman, The Interstate Commerce Commission (1931), pp. 387–388.

that Congress has broad powers to convert "moral" obligations into "legal" ones enforceable by "constitutional" courts. The truth is, I think, that the dimensions of Article III can be altered only by the amending process, not by legislation. Congress can create as respects certain claims a limited "justiciability." But if "justiciability" in the "constitutional" sense is involved, then there must be trial by jury assuming, as my Brother HARLAN does, that the claim is for recovery for torts or some other compensable injury. To repeat, it does not advance analysis by calling the function a "judicial" one (see *Pope* v. *United States*, 323 U. S. 1, 12), for both Article I courts and Article III courts perform functions of that character. The crucial question on this phase of the problems is the manner in which that judicial power is to be exercised.

As Mr. Justice Brandeis made clear in *Tutun* v. *United States*, 270 U. S. 568, 576–577, an administrative remedy may be "judicial." The question here is different; it is whether the procedures utilized by the tribunal must comport with those set forth in the Bill of Rights and in the body of the Constitution. Yet who would maintain that in an administrative action for damages a jury trial was necessary?

Judges of the Article III courts work by standards and procedures which are either specified in the Bill of Rights or supplied by well-known historic precedents. Article III courts are *law courts, equity courts,* and *admiralty courts* [5]—all specifically named in Article III. They sit

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[5] As respects admiralty, Chief Justice Marshall said in *American Ins. Co.* v. *Canter*, 1 Pet. 511, 545:

"If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that 'the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to

to determine "cases" or "controversies." But Article I courts have no such restrictions. They need not be confined to "cases" or "controversies" but can dispense legislative largesse. See *United States* v. *Tillamooks,* 329 U. S. 40; 341 U. S. 48. Their decisions may affect vital interests; yet like legislative bodies, zoning commissions, and other administrative bodies they need not observe the same standards of due process required in trials of Article III "cases" or "controversies." See *Bi-Metallic Co.* v. *Colorado,* 239 U. S. 441. That is what Chief Justice Marshall meant when he said in *American Ins. Co.* v. *Canter,* 1 Pet. 511, 545–546, that an Article I court (in that case a territorial court) could make its adjudications without regard to the limitations of Article III. On the other hand, as the Court in *O'Donoghue* v. *United States, supra,* at 546, observed, Article III courts could not be endowed with the administrative and legislative powers (or with the power to render advisory opinions) which Article I tribunals or agencies exercise.

In other words, the question, apart from the constitutional guarantee of tenure and the provision against diminution of salary, concerns the functions of the particular tribunal. Article III courts have prescribed for them constitutional standards some of which are in the Bill of Rights, while some (as for example those concerning bills of attainder and *ex post facto* laws) are in the body of the Constitution itself. Article I courts, on the other hand, are agencies of the legislative or executive branch. Thus while Article III courts of law must sit with a jury in suits where the value in controversy exceeds $20, the Court of Claims—an Article I court—is not so confined by the Seventh Amendment. The claims which

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all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.'

"The Constitution certainly contemplates these as three distinct classes of cases . . . ."

it hears are claims with respect to which the Government has agreed to be sued. As the Court said in *McElrath* v. *United States*, 102 U. S. 426, 440, since the jurisdiction of the Court of Claims is permissive only, Congress can prescribe the rules and the procedures to be followed in pursuing claims against the Government. Likewise, the Court of Customs Appeals hears appeals that "include nothing which inherently or necessarily requires judicial determination, but only matters the determination of which may be, and at times has been, committed exclusively to executive officers." *Ex parte Bakelite Corp., supra*, at 458.

The judicial functions exercised by Article III courts cannot be performed by Congress nor delegated to agencies under its supervision and control.[6] The bill of

[6] The limitations on Article III courts that distinguish them from Article I courts were stated by Chief Justice Vinson in *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582, 629–630, in words that have, I think, general acceptance, though on the precise issue he wrote in dissent:

"In *Keller* v. *Potomac Electric Co.*, 261 U. S. 428 (1923), where this Court had before it an Act under which the courts of the District of Columbia were given revisory power over rates set by the Public Utilities Commission of the District, the appellee sought to sustain the appellate jurisdiction given this Court by the Act on the basis that 'Although Art. III of the Constitution limits the jurisdiction of the federal courts, this limitation is subject to the power of Congress to enlarge the jurisdiction, where such enlargement may reasonably be required to enable Congress to exercise the express powers conferred upon it by the Constitution.' 261 U. S. at 435. There, as here, the power relied upon was that given Congress to exercise exclusive jurisdiction over the District of Columbia, and to make all laws necessary and proper to carry such powers into effect. But this Court clearly and unequivocally rejected the contention that Congress could thus extend the jurisdiction of constitutional courts, citing the note to *Hayburn's Case*, 2 Dall. 409, 410 (1792); *United States* v. *Ferreira*, 13 How. 40, note, p. 52 (1851), and *Gordon* v. *United States*, 117 U. S. 697 (1864). These and other decisions of

attainder is banned by Art. I, § 9. If there is to be punishment, courts (in the constitutional sense) must administer it. As we stated in *United States* v. *Lovett,* 328 U. S. 303, 317:

> "Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts."

Moreover, when an Article III court of law acts, there is a precise procedure that must be followed:

> "An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him." *Id.,* 317–318.

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this Court clearly condition the power of a constitutional court to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, *Marbury* v. *Madison,* 1 Cranch 137 (1803), the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, *Muskrat* v. *United States,* 219 U. S. 346 (1911); *Gordon* v. *United States, supra,* the absence of revisory or appellate power in any other branch of Government, *Hayburn's Case, supra; United States* v. *Ferreira, supra,* and the absence of administrative or legislative issues or controversies, *Keller* v. *Potomac Electric Co., supra; Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693 (1927)."

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On the civil side there is not only the right to trial by jury in suits at common law where the value in controversy exceeds $20 but there is also the mandate of the Seventh Amendment directing that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Neither of these limitations is germane to litigation in the Court of Claims or in the Court of Customs and Patent Appeals. Those courts, moreover, exercise no criminal jurisdiction, no admiralty jurisdiction, no equity jurisdiction.

As noted, the advisory opinion is beyond the capacity of Article III courts to render. *Muskrat* v. *United States,* 219 U. S. 346. Yet it is part and parcel of the function of legislative tribunals.[7]

Thus I cannot say, as some do, that the distinction between the two kinds of courts is a "matter of language."[8] The majority over and again emphasizes the declaration by Congress that each of the courts in question is an Article III court. It seems that the majority tries to gain momentum for its decision from those congressional declarations. This Court, however, is the expositor of the meaning of the Constitution, as *Marbury* v. *Madison,* 1 Cranch 137, held; and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas. The declarations by Congress that these legislative tribunals are Article III

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[7] See 28 U. S. C. § 1492, giving the Court of Claims power "to report to either House of Congress on any bill referred to the court by such House." And see 28 U. S. C. §§ 2509, 2510. 28 U. S. C. § 1542 gave the Court of Customs and Patent Appeals a kind of administrative review over certain decisions of the patent office. And see note 2, *supra.*

[8] See H. R. Rep. No. 2348, 84th Cong., 2d Sess., p. 3.

courts [9] would be determinative only if Congress had the power to modify or alter the concepts that radiate throughout Article III and throughout those provisions of the Bill of Rights that specify how the judicial power granted by Article III shall be exercised.

An appointment is made by the President and confirmed by the Senate in light of the duties of the particular office. Men eminently qualified to sit on Article I tribunals or agencies are not picked or confirmed in light of their qualifications to preside at jury trials or to process on appeal the myriad of constitutional and procedural problems involved in Article III "cases" or "controversies." A President who sent a name to the Senate for the Interstate Commerce Commission or Federal Trade Commission might never dream of entrusting the nominee with the powers of an Article III judge. The tasks are so different, the responsibilities and the qualifications so diverse that it is difficult for one who knows the federal system to see how in the world of practical affairs these offices are interchangeable.

In the Senate debate on the Court of Customs Appeals, Senator Cummins stated that the judges who were to man it were to become tariff "experts" whose judicial business would be "confined to the matter of the duties on imports." 44 Cong. Rec. 4185. Senator McCumber, who spoke for the Committee, emphasized the technical nature of the work of those judges and the unique specialization of their work.

> "The law governing the development of the human intellect is such that constant study of a particular question necessarily broadens and expands and intensifies and deepens the mind on that particular sub-

[9] See Act of July 28, 1953, 67 Stat. 226 (Court of Claims); Act of July 14, 1956, 70 Stat. 532 (Customs Court); Act of August 25, 1958, 72 Stat. 848 (Court of Customs and Patent Appeals).

> ject. Any man who has gone over even the cotton schedule will understand how delicate questions will arise; how complex those questions must necessarily be, and how necessary it will be to have judges who will possess technical knowledge upon that subject; and a technical knowledge can only be obtained by a constant daily study of those questions. For that second reason it was thought best to have a court whose whole attention, whose whole life work, should be given to that particular subject." *Id.*, at 4199.

Could there be any doubt that the late John J. Parker, rejected by the Senate for this Court, would have been confirmed for one of these Article I courts?

It is said that Congress could separate law and equity and create federal judges who, though Article III judges, sit entirely on the equity side. If Congress can do that, it is said that Congress can divide up all judicial power as it chooses and by making tenure permanent allow judges to be assigned from an Article I to an Article III court. The fact that Article III judicial power may be so divided as to produce judges with no experience in the trial of jury cases or in the review of them on appeal is no excuse for allowing legislative judges to be imported into the important fields that Article III preserves and that are partly safeguarded by the Bill of Rights and partly represented by ancient admiralty practice [10] and equity procedures. Federal judges named to Article III courts are picked in light of the functions entrusted to them. No one knows whether a President would have appointed to an Article III court a man he named to an Article I court.

My view is that we subtly undermine the constitutional system when we treat federal judges as fungible. If members of the Court of Claims and of the Court of Cus-

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[10] See *The Lottawanna*, 21 Wall. 558, 575; *The Osceola*, 189 U. S. 158.

toms and Patent Appeals can sit on life-and-death cases in Article III courts, so can a member of any administrative agency who has a *statutory* tenure that future judges sitting on this Court by some mysterious manner may change to constitutional tenure. With all deference, this seems to me to be a light-hearted treatment of Article III functions.[11] Men of highest quality chosen as Article I judges might never pass muster for Article III courts when tested by their record of tolerance for minori-

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[11] The Court does great mischief in today's opinions. The opinion of my Brother HARLAN stirs a host of problems that need not be opened. What is done will, I fear, plague us for years.

First, that opinion cites with approval *Ex parte McCardle*, 7 Wall. 506, in which Congress withdrew jurisdiction of this Court to review a *habeas corpus* case that was *sub judice*, and then apparently draws a distinction between that case and *United States* v. *Klein*, 13 Wall. 128, where such withdrawal was not permitted in a property claim. There is a serious question whether the *McCardle* case could command a majority view today. Certainly the distinction between liberty and property (which emanates from this portion of my Brother HARLAN's opinion) has no vitality even in terms of the Due Process Clause.

Second, *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693, is apparently overruled. Why this is done is not apparent. That case ruled on the question whether a ruling on a Patent Office determination was "judicial." Whether it was or not is immaterial because, as already noted, Article I courts, like Article III courts, exercise "judicial" power. The only relevant question here is whether a court that need not follow Article III procedures is nonetheless an Article III court.

Third, it is implied that Congress could vest the lower federal courts with the power to render advisory opinions. The character of the District Court in the District of Columbia has been differentiated from the other District Courts by *O'Donoghue* v. *United States*, *supra*, in that the former is, in part, an agency of Congress to perform Article I powers. How Congress could transform regular Article III courts into Article I courts is a mystery. Certainly we should not decide such an important issue so casually and so unnecessarily.

ties and for their respect of the Bill of Rights—neither of which is as crucial to the performance of the duties of those who sit in Article I courts as it is to the duties of Article III judges.

In sum, judges who do not perform Article III functions, who do not enjoy *constitutional* tenure and whose salaries are not *constitutionally* protected against diminution during their term of office cannot be Article III judges.

Judges who perform "judicial" functions on Article I courts do not adjudicate "cases" or "controversies" in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.

Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and *ex post facto* laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

For these reasons I would reverse the judgments below.

Syllabus.

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 400. Argued March 20, 1962.—Decided June 25, 1962.

Appellant is a Pennsylvania corporation authorized to operate a railroad only within Pennsylvania and having no tracks outside of Pennsylvania. It owned freight cars which were used in ordinary transport operations in three ways: (1) By appellant on its own tracks in Pennsylvania; (2) by a New Jersey railroad on fixed routes and regular schedules over that railroad's tracks in New Jersey; and (3) by many other railroads on their own lines in various parts of the country. Pennsylvania levied an annual property tax on the total value of all freight cars owned by appellant; and appellant challenged its right to do so under the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Held:*

1. Appellant could not avoid imposition of Pennsylvania's tax on the full value of its freight cars merely by proving that some determinable fraction of them were absent from the State for part of the tax year. It must sustain the burden of proving that some determinable portion of them may be similarly taxed in another State. Pp. 611–613.

2. Appellant's freight cars that had been run habitually on fixed routes and regular schedules over the lines of the New Jersey railroad in New Jersey were subject to the imposition of an apportioned ad valorem tax by the State of New Jersey; and, consequently, the daily average of appellant's freight cars located on the New Jersey railroad's lines during the tax year could not constitutionally be included in the computation of this Pennsylvania tax. Pp. 613–614.

3. On the record in this case, Pennsylvania could constitutionally tax, at full value, the remainder of appellant's fleet of freight cars, including those used by other railroads in other States, since appellant has failed to sustain its burden of proving that a tax situs had been established elsewhere with respect to such cars. Pp. 614–617.

4. For the purposes of this tax, Pennsylvania could differentiate between railroads having tracks which lay only within its borders and those whose tracks were located both within and without the

State, since such a classification would be reasonable and would not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 617–618.

403 Pa. 419, 169 A. 2d 878, affirmed in part and reversed in part.

Roy J. Keefer argued the cause and filed briefs for appellant.

George W. Keitel, Deputy Attorney General of Pennsylvania, argued the cause for appellee. With him on the briefs was *David Stahl,* Attorney General.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In this case we must decide whether the Commonwealth of Pennsylvania may, consistently with the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, impose an annual property tax on the total value of freight cars owned by the appellant, a Pennsylvania corporation, despite the fact that a considerable number of such cars spend a substantial portion of the tax year on the lines of other railroads located outside the State. The Supreme Court of Pennsylvania upheld the application of the State's Capital Stock Tax, Purdon's Pa. Stat. Ann., 1949, Tit. 72, §§ 1871, 1901, to the full value of all appellant's freight cars.[1] 403 Pa.

[1] The tax imposed by the state statute is denominated a "capital stock tax," but it has been construed by the Pennsylvania courts as being the equivalent of a property tax. *Pennsylvania* v. *Standard Oil Co.,* 101 Pa. 119, 145; *Pennsylvania* v. *Union Shipbuilding Co.,* 271 Pa. 403, 114 A. 257. Property employed by a corporation in its operations in another State and permanently located there is not subject to this tax. *Pennsylvania* v. *American Dredging Co.,* 122 Pa. 386, 15 A. 443. The value of the capital stock subjected to the tax is determined by multiplying the total value of the capital stock, as measured by the worth of all the corporation's real and personal property, by the ratio that the value of such non-exempt property within Pennsylvania (including that temporarily

419, 169 A. 2d 878. We postponed consideration of the question of jurisdiction to the hearing on the merits, 368 U. S. 912, and now find that the appeal is appropriately before us under 28 U. S. C. § 1257 (2). *E. g., Standard Oil Co.* v. *Peck,* 342 U. S. 382.

We take the facts pertinent to decision from a stipulation submitted by the parties to the trial court. The appellant is a Pennsylvania corporation authorized to operate a railroad only within the State. It has not been licensed to do business elsewhere. The company's track runs from the anthracite coal region in Pennsylvania to the Pennsylvania-New Jersey border, at Easton, where it connects with the lines of the Central Railroad Company of New Jersey (hereinafter CNJ), a New Jersey corporation which owns all the outstanding shares of appellant's stock.

In 1951, the year for which the tax was assessed, the appellant owned 3,074 freight cars which were put to use in ordinary transport operations in three ways: (1) by the appellant on its own tracks; (2) by CNJ on that company's tracks in New Jersey; (3) by other unaffiliated railroads on their own lines in various parts of the country. CNJ's use of appellant's cars was pursuant to operating agreements under which CNJ was obliged to pay a daily rental equal to the then-effective rate prescribed by the Association of American Railroads. In order to facilitate interstate transportation by the interchange of equipment among carriers, as prescribed by 49 U. S. C. § 1, pars. (4), (10), (12), the members of the Association,

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outside the State) bears to the value of the corporation's property everywhere. Purdon's Pa. Stat. Ann., 1949, Tit. 72, § 1896; *Pennsylvania* v. *Delaware, L. & W. R. Co.,* 145 Pa. 96, 22 A. 157. With reference to this precise taxing measure, this Court has said in the past that it, in practical effect, amounts to "a tax upon the specific property which gives the added value to the capital stock." *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 U. S. 341, 357.

including the appellant, had entered into a separate "Car Service and Per Diem Agreement" under which each subscriber was authorized to use on its own lines the available freight cars of other subscribers at the established per diem rental. Consequently, during 1951 many of the appellant's freight cars were also used by other railroads on lines outside Pennsylvania.

Appellant contended in the state courts, as it does here, that in computing its Pennsylvania capital stock tax, which is measured by the value of such property as is not exempt from taxation (note 1, *supra*), it was constitutionally entitled to deduct from the value of its taxable assets a proportional share reflecting the time spent by its freight cars outside Pennsylvania. In support of this claim appellant offered a statistical summary of the use of its freight cars during 1951, seeking to prove that a daily average of more than 1,659 of its 3,074 cars were located on the lines of railroads (including CNJ) which owned no track in Pennsylvania.[2]

It also claimed that a daily average of approximately 1,056 other cars had been used by railroads having lines both within and without Pennsylvania. As to such cars, appellant sought to allocate to Pennsylvania only such portions of their value as the combined ratio of road miles of each user-railroad's tracks within Pennsylvania bore to its total road mileage throughout the United States.[3]

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[2] If appellant's entire fleet of cars (3,074) is multiplied by the number of days in the year 1951 (365), the total number of "car days" comes to 1,122,010. Appellant's schedules show that 605,678 "car days" were spent on railroads which owned no track in Pennsylvania. If this latter number is divided by 365, the quotient (1,659) represents the average number of cars located on such railroads on any one day during 1951.

[3] For example, appellant computes 91,899 "car days" as having been spent on the lines of the New York Central Railroad. Since 7.36% of that railroad's track mileage is within Pennsylvania, appellant allocates 6,764 "car days," a proportional share, to Pennsylvania.

These claims were disallowed by the Pennsylvania Board of Finance and Revenue, by the Court of Common Pleas of Dauphin County, and by the Supreme Court of Pennsylvania.[4] The state courts relied primarily on this Court's decision in *New York Central R. Co.* v. *Miller*, 202 U. S. 584, which upheld the constitutionality of a domiciliary State's ad valorem property tax levied upon the full value of a railroad's rolling stock, albeit "some considerable proportion of the [railroad's] . . . cars always . . . [was] absent from the State." *Id.*, at 595.

I.

Since *Miller* this Court has decided numerous cases touching on the intricate problems of accommodating, under the Due Process and Commerce Clauses, the taxing powers of domiciliary and other States with respect to the instrumentalities of interstate commerce.[5] None of these decisions has weakened the pivotal holding in *Miller*—that a railroad or other taxpayer owning rolling stock cannot avoid the imposition of its domicile's property tax on the full value of its assets merely by proving that some determinable fraction of its property was absent from the State for part of the tax year. This Court has consistently held that the State of domicile retains jurisdic-

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[4] The Supreme Court of Pennsylvania did find, however, that certain diesel locomotives which had been leased to CNJ by the appellant and which traveled along fixed routes and schedules had acquired a tax situs in New Jersey and could not be taxed at their full value by Pennsylvania. The State has not sought review of this part of that decision.

[5] *E. g., Southern Pac. Co.* v. *Kentucky*, 222 U. S. 63; *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158; *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S. 292; *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169; *Standard Oil Co.* v. *Peck*, 342 U. S. 382; *Braniff Airways, Inc.*, v. *Nebraska State Board of Equalization*, 347 U. S. 590. See generally Developments, 75 Harv. L. Rev. 953, 979–987.

tion to tax tangible personal property which has "not acquired an actual situs elsewhere." *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158, 161.

This is because a State casts no forbidden burden upon interstate commerce by subjecting its own corporations, though they be engaged in interstate transport, to nondiscriminatory property taxes. It is only "multiple taxation of interstate operations," *Standard Oil Co.* v. *Peck*, 342 U. S. 382, 385, that offends the Commerce Clause. And obviously multiple taxation is possible only if there exists some jurisdiction, in addition to the domicile of the taxpayer, which may constitutionally impose an ad valorem tax.

Nor does the Due Process Clause confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, held only that the Due Process Clause prohibited ad valorem taxation by the owner's domicile of tangible personal property *permanently* located in some other State. *Northwest Airlines, Inc.*, v. *Minnesota*, 322 U. S. 292, reaffirmed the principle established by earlier cases that tangible property for which *no* tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. See *New York Central R. Co.* v. *Miller, supra; Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 69; *Johnson Oil Refining Co.* v. *Oklahoma, supra.* If such property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a "tax situs," it is surely appropriate to presume that the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as a prerequisite for taxation. See *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174.

Accordingly, the burden is on the taxpayer who contends that some portion of its total assets are beyond the reach of the taxing power of its domicile to prove that the same property may be similarly taxed in another jurisdiction. Cf. *Dixie Ohio Express Co.* v. *State Revenue Comm'n,* 306 U. S. 72.

The controlling question here is, therefore, the same as it was in *Standard Oil Co.* v. *Peck,* 342 U. S. 382, where the decision whether a state property tax might constitutionally be imposed on the full value of a domiciliary's moving assets turned on whether " 'a defined part of the domiciliary corpus' "—there consisting of boats and barges traveling along inland waters—"could be taxed by the several states on an apportionment basis." 342 U. S., at 384.

Since the burden of proving an exemption is on the taxpayer who claims it, we must consider whether the stipulated facts show that some determinable portion of the value of the appellant's freight cars had acquired a tax situs in a jurisdiction other than Pennsylvania.

II.

With respect to the freight cars that had been used on the lines of CNJ during the taxable year, the stipulation establishes that they "were run on fixed routes and regular schedules . . . over the lines of CNJ . . . in New Jersey." Their habitual employment within the jurisdiction in this manner would assuredly support New Jersey's imposition of an *apportioned* ad valorem tax on the value of the appellant's fleet of freight cars. *Marye* v. *Baltimore & Ohio R. Co.,* 127 U. S. 117, 123–124; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 23; *Union Refrigerator Transit Co.* v. *Lynch,* 177 U. S. 149; *Johnson Oil Refining Co.* v. *Oklahoma,* 290 U. S. 158, 162–163; cf. *Ott* v. *Mississippi Valley Barge Line Co.,* 336 U. S.

169; *Braniff Airways, Inc.*, v. *Nebraska Board of Equalization*, 347 U. S. 590, 601. Consequently, the daily average of freight cars located on the CNJ lines in the 1951 tax year, 158 in number, could not constitutionally be included in the computation of this Pennsylvania tax. In this respect, the Pennsylvania Supreme Court's decision (which is difficult to reconcile with its holding as to the similarly situated locomotives, note 4, *supra*) cannot be accepted.

III.

We conclude, however, that on the record before us Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars, including those used by other railroads under the Car Service and Per Diem Agreement of the Association of American Railroads. These were, in the language of the stipulation, "regularly, habitually and/or continuously employed" in this manner, but they did not run "on fixed routes and regular schedules" as did the cars used by CNJ.

Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction. Had the record shown that appellant's cars traveled through other States along fixed and regular routes, even if it were silent with respect to the length of time spent in each nondomiciliary State, it would doubtless follow that the States through which the regular traffic flowed could impose a property tax measured by some fair apportioning formula. Cf. *Braniff Airways, Inc.*, v. *Nebraska Board of Equalization*, 347 U. S. 590. And this would render unconstitutional any domiciliary ad valorem tax at full value on property that could thus be

taxed elsewhere. *Standard Oil Co.* v. *Peck, supra,* at 384.[6]

Alternatively a nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In *American Refrigerator Transit Co.* v. *Hall,* 174 U. S. 70, this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax year, although it was agreed by the parties that the cars "never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains." *Id.,* at 72. Habitual employment within the State of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average number of cars so engaged.

On the record before us, however, we find no evidence, except as to the CNJ cars, of either regular routes through *particular* nondomiciliary States or habitual presence, though on irregular missions, in *particular* nondomiciliary States. It is not disputed that many of the railroads listed as owning no track within Pennsylvania do have lines in more than one State, but there is no way of knowing which, if any, of these States may have acquired taxing jurisdiction over some of appellant's freight cars. And

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[6] The record in *Standard Oil Co.* v. *Peck* discloses that the boats and barges which Ohio sought to tax had been traveling along three regular routes on the Mississippi and Ohio Rivers: from Memphis, Tennessee, to Mt. Vernon, Indiana; from Memphis, Tennessee, to Bromley, Kentucky; and from Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky. The States in which the vessels landed, as well as those through which they regularly traveled, could undoubtedly have traced these regular trips and levied appropriately apportioned ad valorem taxes.

even with respect to railroads whose lines do not extend beyond the borders of a single State, it cannot be determined whether their use of appellant's cars was habitual or merely sporadic.[7] It must be obvious that the fraction of a railroad's lines located within Pennsylvania is wholly unilluminating as to the consistency with which that railroad used appellant's cars in some other State.

In short, except as to freight cars traveling on the lines of the CNJ, this record shows only that a determinable number of appellant's cars were employed outside the Commonwealth of Pennsylvania during the relevant tax year. But as this leaves at large the possibility of their having a nondomiciliary tax situs elsewhere, that showing does not suffice under our cases to exclude Pennsylvania from taxing such cars to their full value. Neither *Union Refrigerator Transit Co.* v. *Kentucky, supra,* nor *Standard Oil Co.* v. *Peck, supra,* is properly read to the contrary. In the former, the case was remanded for further proceedings "not inconsistent" with the Court's opinion that the cars in question, "so far as they were [permanently] located and employed in other States," were not subject to the taxing power of the domiciliary State. 199 U. S., at 211. In the latter, the existence of a tax situs in one or more nondomiciliary States sufficiently appeared from the record. Note 6, *supra.* To accept the proposition that a mere general showing of continuous use of movable property outside the domiciliary State is sufficient to exclude the taxing power of

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[7] The fact that revenues for the use of one or more of appellant's cars were accounted for by a subscriber to the "Car Service and Per Diem Agreement" does not necessarily indicate that such cars were ever used on the lines of that subscriber. For under the Agreement subscribers were authorized to permit the use of another railroad's cars by nonsubscribers, though they themselves remained liable to the owner railroad for the per diem rentals in respect of their nonsubscriber use.

that State with respect to it, would surely result in an unsound rule; in instances where it was ultimately found that a tax situs existed in no other State such property would escape this kind of taxation entirely.

As we have shown there is nothing to the contrary in *Standard Oil Co.* v. *Peck.* Note 6, *supra.* And neither the *Braniff* nor *Ott* case points to a different conclusion. In *Braniff* the airplanes held subject to nondomiciliary taxation were shown by the record to have flown on fixed and regular routes. 347 U. S., at 600–601. In *Ott* the Court was careful to point out that "the statute 'was intended to cover *and actually covers here,* an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.'" 336 U. S., at 175. (Emphasis added.) In the case before us it is impossible to tell, except as to cars on the lines of the CNJ, what the average number of cars was annually in any given State.

IV.

Finally, we think that the appellant's equal protection argument is insubstantial and that it was correctly rejected by the Pennsylvania Supreme Court. For purposes of this tax, Pennsylvania could reasonably differentiate between railroads having tracks which lay only within its borders and those whose tracks were located both within and without the State. The various considerations that justify such a classification from a federal constitutional standpoint need hardly be elaborated. It is sufficient to note that the State might reasonably have concluded that the probability of a nondomiciliary apportioned ad valorem tax on a railroad's total assets is greater if the railroad maintains tracks in another State than if it does not. Or it might have determined that the imposition of franchise or other taxes by nondomiciliary States in which the railroad did business compelled some

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mitigation of the domiciliary's property tax in order to prevent an oppressive tax burden. In either event, the possible basis for the taxing measure's classification would be reasonable and could not be held to violate the Equal Protection Clause. Cf. *Allied Stores of Ohio, Inc.*, v. *Bowers*, 358 U. S. 522, 526–528; *Stebbins* v. *Riley*, 268 U. S. 137, 142; *Kidd* v. *Alabama*, 188 U. S. 730.

Accordingly, we conclude that with respect to all cars other than those employed by CNJ on its lines in New Jersey the appellant has failed to sustain its burden of proving that a tax situs had been acquired elsewhere. The exemption was properly disallowed in this regard.

The judgment of the Supreme Court of Pennsylvania is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BLACK, concurring.

In holding that one State's property tax may be invalidated in part because excessive under the Commerce Clause upon the showing of a risk that some other State could impose a tax on part of the value of the same property, the Court is following principles announced in prior decisions of this Court from which I dissented.[1] While my views expressed in those cases remain un-

[1] See, *e. g.*, *Gwin, White & Prince, Inc.*, v. *Henneford*, 305 U. S. 434, 442; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 316. See also *Northwest Airlines* v. *Minnesota*, 322 U. S. 292, 301 (concurring opinion).

changed, the necessity of this Court's deciding cases requires me to make decisions under the constitutional doctrine there declared so long as the Court remains committed to it.[2] Where a party seeks to invoke that doctrine, as here, I wholly agree with the Court that the burden of showing that there is a risk of multiple taxation should rest upon the party challenging the constitutionality of a state tax. I also agree with the Court that the railroad in this case has failed to show a risk of multiple taxation with reference to any cars other than the average number that are in New Jersey on any given day. It is for the foregoing reasons that I concur in the Court's judgment and its opinion insofar as it rests on the Commerce Clause.

Since I think partial invalidation of the tax as to the average number of cars in New Jersey on any given day in the taxable year is fully supported by the Commerce Clause as this Court has interpreted it, I would have been content not to discuss the due process question at all. But since the Court does rest in part on due process, I find it necessary to express my doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without "jurisdiction to tax" property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines concerning the power of States to tax. In fact neither of these doctrines originated in the Due Process Clause at all, but were first declared by this Court long before the Fourteenth Amendment with its Due Process Clause was

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[2] Cf. *Morgan* v. *Virginia*, 328 U. S. 373, 386 (concurring opinion).

adopted in 1868.[3] And in the first case striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause nor any other constitutional provision was even mentioned; the Court simply struck down the state tax saying that to sustain it would be "giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."[4] These cases and others that followed for many years after the adoption of the Amendment rested either on the Commerce Clause or on no constitutional provision at all.[5] In fact not a single state tax was struck down by this Court as a violation of the Due Process Clause until 1903[6]—35 years after the adoption of the Amendment—and then wholly without any historical or other reasons to show why the cryptic words of the Due Process Clause justified the invalidation of otherwise lawful state taxes. Nor did the Court reveal its reasons for giving due process this meaning in the next case.[7] Finally, in the third case applying the Due Process Clause to strike down a state tax, the Court's complete lack of explanation led Mr. Justice Holmes to say:

> "It seems to me that the result reached by the court probably is a desirable one, but I hardly understand

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[3] *Hays* v. *Pacific Mail Steamship Co.*, 17 How. 596 (1854). See also *The Apollon*, 9 Wheat. 362, 370 (1824); *Braniff Airways, Inc.* v. *Nebraska State Board of Equalization*, 347 U. S. 590, 599 n. 18.

[4] *Railroad Co.* v. *Jackson*, 7 Wall. 262, 268 (1869).

[5] See, *e. g.*, *St. Louis* v. *Ferry Co.*, 11 Wall. 423 (1871); *State Tax on Foreign-Held Bonds*, 15 Wall. 300 (1873); *Morgan* v. *Parham*, 16 Wall. 471 (1873); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (1885). See also *Tappan* v. *Merchants' National Bank*, 19 Wall. 490 (1873); *Coe* v. *Errol*, 116 U. S. 517 (1886); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 (1891).

[6] *Louisville & Jeffersonville Ferry Co.* v. *Kentucky*, 188 U. S. 385.

[7] *Delaware, Lackawanna & Western R. Co.* v. *Pennsylvania*, 198 U. S. 341 (1905)

how it can be deduced from the Fourteenth Amendment, and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed." [8]

The Court has ever since used the Due Process Clause to strike down state laws by finding in it substantially the same protection for interstate commerce as it has found in the Commerce Clause.[9] But there is no reference to commerce in the Fourteenth Amendment and the Court has still never adequately explained just what the basis for

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[8] *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 211 (1905). Professor Beale has said of this decision that, "[t]he dissent seemed sound as directed against the opinion that the state had no jurisdiction. Nevertheless, Judge Holmes was equally sound in saying that the result was a desirable one. It would be a rash constitutional lawyer who would argue today that an undesirable result was nevertheless constitutional." 1 Beale, Conflict of Laws, 522. The use of the Due Process Clause as a method of striking down state tax laws remained a source of concern to Mr. Justice Holmes throughout the remainder of his service on the Court and produced quite a number of dissents. See, *e. g., Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 96 (1929); *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 216 (1930) (overruling *Blackstone* v. *Miller,* 188 U. S. 189); *Baldwin* v. *Missouri,* 281 U. S. 586, 595 (1930). In the *Baldwin* case he stated:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." 281 U. S., at 595. See also Mr. Justice, later Chief Justice, Stone's dissent in *First National Bank* v. *Maine,* 284 U. S. 312, 331, in which he was joined by Mr. Justice Holmes and Mr. Justice Brandeis and *State Tax Comm'n* v. *Aldrich,* 316 U. S. 174, where the Court overruled *First National Bank* for the reasons expressed by the dissent in that case.

[9] See *H. P. Hood & Sons, Inc.,* v. *Du Mond,* 336 U. S. 525, 562 (dissenting opinion).

its constitutional doctrine is. Because of this I have long entertained many of the same doubts that Mr. Justice Holmes expressed as to the use of this flexible and expansive interpretation of due process to invalidate state tax laws,[10] but since the Court's holding here adequately rests on the presently prevailing interpretation of the Commerce Clause, I do not find this to be an appropriate occasion to suggest reconsideration of the applicability of the Due Process Clause to state tax laws.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting in part.

The stipulations of fact in this case show that an average of 158 freight cars (of the value of $525,765.71) run on fixed routes and regular schedules over railroad lines outside of Pennsylvania. The Court properly holds that they are beyond the constitutional reach of Pennsylvania.

The stipulations of fact also show that an average of 2189.30 freight cars (of the value of $7,282,773) run regularly, habitually, and continuously on the lines of other railroads outside of Pennsylvania, though not on fixed schedules. The Pennsylvania tax on these cars is sustained on the authority of *New York Central R. Co.* v. *Miller,* 202 U. S. 584; and if that case is still intact the Court is correct in denying the exemption claimed.

With all deference we cannot, however, allow Pennsylvania to lay this tax and adhere to our recent decisions. In *Ott* v. *Mississippi Barge Line,* 336 U. S. 169, we allowed Louisiana and the City of New Orleans to levy ad valorem taxes on barges of foreign corporations even though the barges were not permanently in those jurisdictions nor operated there on fixed routes and regular schedules. The assessments sustained were "based on the ratio

[10] See, *e. g., Treichler* v. *Wisconsin,* 338 U. S. 251, 257 (dissenting opinion); *Thomas* v. *Virginia,* 364 U. S. 443 (dissenting opinion).

between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line." *Id.*, at 171. We adopted for barge lines the rule applicable to railroads, saying that we saw "no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce." *Id.*, at 174. We went on to say:

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 365. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Ibid.*

We applied the decision in *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, to barges, even though the *Pullman's Car* case, as noted in the *Miller* case (202 U. S., at 597), sustained a tax on capital stock where the "same cars were continuously receiving the protection" of the nondomiciliary taxing State. Nonetheless, in the *Ott* decision we allowed the tax by the nondomiciliary State to be levied on "an average portion of property permanently within the State." 336 U. S., at 175.

In *Standard Oil Co.* v. *Peck*, 342 U. S. 382, we completed the redefinition of the holding in the *Miller* decision which was implicit in what we wrote in *Ott*. In the *Peck* case the domiciliary State was held to have no power to tax barges, except on a formula "which fairly apportioned the tax to the commerce carried on within the state" (*id.*,

at 383), as a result of which "inland water transportation" was placed "on the same constitutional footing as other interstate enterprises." *Id.*, at 384. We distinguished the *Miller* case by saying that there "it did not appear that 'any specific cars or any average of cars' was so continuously in another state as to be taxable there." *Id.*, at 384. And we went on to say:

> "No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under *Ott* v. *Mississippi Barge Line Co., supra,* could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See *Union Transit Co.* v. *Kentucky,* 199 U. S. 194. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations." *Id.*, at 384–385.

In *Braniff Airways* v. *Nebraska Board,* 347 U. S. 590, we allowed a nondomiciliary State to levy an apportioned ad valorem tax on aircraft making 18 stops per day in that State. We said, "We think such regular contact is sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the state." *Id.*, at 601.

As a result of the *Ott, Peck* and *Braniff* cases the average of 2189.30 freight cars that run regularly, habitually, and continuously on lines of other railroads outside Pennsylvania could be taxed by other States, even though no State can identify the precise cars within its borders and even though the complement of cars is constantly

changing. Since that average of freight cars is regularly, habitually, and continuously outside Pennsylvania, those cars are taxable elsewhere and thus beyond Pennsylvania's reach. The fact that we do not know the average annual number of cars in any given State does not help Pennsylvania's case. Whatever the average in any one State, the total outside Pennsylvania and taxable elsewhere is known and definite. Since that is true, we sanction double taxation when we sustain this tax. We would not allow it in the case of any other interstate business; and, as I read the Constitution, no exception is made that puts the railroad business at a disadvantage.

LINK *v.* WABASH RAILROAD CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 422. Argued April 3, 1962.—Decided June 25, 1962.

More than six years after institution of this diversity-of-citizenship action by petitioner in a Federal District Court to recover damages for personal injuries sustained in a collision between petitioner's automobile and one of respondent's trains, more than three years after petitioner had finally prevailed against respondent's motion for judgment on the pleadings, and after two fixed trial dates had been postponed, the Court, on September 29, 1960, scheduled a pretrial conference to be held in Hammond, Ind., on October 12, 1960, at 1:00 p. m. and notified counsel for both sides. During the morning of October 11, petitioner's counsel telephoned respondent's counsel from Indianapolis that he expected to be at the pretrial conference. At about 10:45 a. m. on October 12, petitioner's counsel telephoned the judge's secretary to tell the judge that he was otherwise engaged in Indianapolis, that he could not be in Hammond by 1:00 o'clock; but that he would be there on the afternoon of October 13 or any time on October 14, if the pretrial conference could be reset. When petitioner's counsel failed to appear at the pretrial conference, the Court, acting *sua sponte*, reviewed the history of the case, found that petitioner's counsel had failed to indicate any reasonable excuse for his nonappearance, and dismissed the action "for failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action." *Held:* The judgment is affirmed. Pp. 627–636.

(a) The long-recognized inherent power of Federal District Courts, acting on their own initiative, to dismiss cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief has not been restricted by Federal Rule of Civil Procedure 41 (b) to cases in which the defendant moves for dismissal. Pp. 629–632.

(b) The circumstances here were such as to dispense with the necessity for advance notice and hearing before dismissing the case. Pp. 632–633.

(c) Petitioner was bound by his lawyer's conduct on the basis of which the action was dismissed. Pp. 633–634.

(d) On the record in this case, it cannot be said that the District Court's dismissal of this action for failure to prosecute amounted to an abuse of discretion. Pp. 633–636.

291 F. 2d 542, affirmed.

Jay E. Darlington argued the cause and filed briefs for petitioner.

John F. Bodle argued the cause for respondent. With him on the briefs were *Roger D. Branigin* and *George T. Schilling.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner challenges, from the standpoint of both power and discretion, the District Court's *sua sponte* dismissal of this diversity negligence action under circumstances that follow.

The action, growing out of a collision between petitioner's automobile and one of respondent's trains, was commenced on August 24, 1954. Some six years later, and more than three years after petitioner had finally prevailed on respondent's motion for judgment on the pleadings (during which time two fixed trial dates had been postponed),[1] the District Court, on September 29, 1960, duly notified counsel for each side of the scheduling of a pretrial conference to be held at the courthouse in Hammond, Indiana, on October 12, 1960, at 1 p. m. During the preceding morning, October 11, petitioner's counsel telephoned respondent's lawyer from Indianapolis, stating that "he was doing some work on some papers," that he expected to be at the pretrial conference, but that he might not attend the taking of a deposition of the plaintiff scheduled for the same day. At about 10:45 on the morning of October 12 petitioner's counsel telephoned the

[1] See note 2, *infra.*

Hammond courthouse from Indianapolis (about 160 miles away), and after asking for the judge, who then was on the bench, requested the judge's secretary to convey to him this message: "that he [counsel] was busy preparing papers to file with the [Indiana] Supreme Court," that "he wasn't actually engaged in argument and that he couldn't be here by 1:00 o'clock, but he would be here either Thursday afternoon [October 13] or any time Friday [October 14] if it [the pretrial conference] could be reset."

When petitioner's counsel did not appear at the pretrial conference the District Court, after reviewing the history of the case [2] and finding that counsel had failed

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[2] A history of the litigation appears in the opinion of the Court of Appeals:

"On August 24, 1954, plaintiff William Link filed his complaint in the district court against defendant The Wabash Railroad Company to recover damages for injuries alleged to have been sustained by him when he drove an automobile into a collision with defendant's train standing across a highway in Indiana.

"On September 17, 1954, defendant appeared and filed its answer to the complaint.

"On April 30, 1955, defendant filed its motion for judgment on the pleadings. On October 18, 1955, hearing was had on this motion. On November 30, 1955, the district court granted defendant's motion for judgment on the pleadings and ordered the cause dismissed. From this order of dismissal plaintiff appealed. On October 10, 1956, our court reversed and remanded the case for trial. . . . 237 F. 2d 1, certiorari denied 352 U. S. 1003 . . . (February 25, 1957). On March 13, 1957, the mandate from this court was filed in the district court.

"Subsequently, the trial court set the case for trial for July 17, 1957. On June 27, 1957, on motion of plaintiff and defendant not objecting, the trial date of July 17, 1957 was vacated; and the cause was continued.

"On August 17, 1957, defendant filed interrogatories for plaintiff to answer. [*Footnote 2 continued on p. 629*]

"to indicate . . . a reasonable reason" for his nonappearance, dismissed the action "for failure of the plaintiff's counsel to appear at the pretrial, for failure to prosecute this action." The court, acting two hours after the appointed hour for the conference, stated that the dismissal was in the "exercise [of] its inherent power." The Court of Appeals affirmed by a divided vote. 291 F. 2d 542. We granted certiorari. 368 U. S. 918.

I.

The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted.[3] The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion

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"On February 24, 1959, the trial court on its own initiative gave notice to the parties, pursuant to Local Rule 11 [footnote omitted], that the cause would be dismissed on March 25, 1959, unless the court ordered otherwise.

"On March 24, 1959, plaintiff filed answers to defendant's interrogatories.

"On March 25, 1959, hearing was had on the show cause order, and on June 4, 1959 the trial court entered an order retaining the case on the docket and setting it for trial for July 22, 1959.

"On July 2, 1959, on defendant's motion, to which plaintiff agreed, the trial date of July 22, 1959 was vacated; and the case was continued.

"On March 11, 1960, defendant filed additional interrogatories for plaintiff to answer. On April 15, 1960, after an extension of time granted by the trial court, plaintiff filed answers to the additional interrogatories.

"On September 29, 1960, pursuant to Local Rule 12, effective March 1, 1960, the district court caused notice to be mailed to counsel for both parties scheduling a pre-trial conference in this case to be held in court on October 12, 1960, at 1:00 o'clock p. m." 291 F. 2d, at 543–544.

[3] See Fed. Rules Civ. Proc., 41 (b), p. 630, *infra*.

in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of *non-suit* and *non prosequitur* entered at common law, *e. g.*, 3 Blackstone, Commentaries (1768), 295–296, and dismissals for want of prosecution of bills in equity, *e. g.*, *id.*, at 451. It has been expressly recognized in Federal Rule of Civil Procedure 41 (b), which provides, in pertinent part:

> "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Petitioner contends that the language of this Rule, by negative implication, prohibits involuntary dismissals for failure of the plaintiff to prosecute *except* upon motion by the defendant. In the present case there was no such motion.

We do not read Rule 41 (b) as implying any such restriction. Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to

achieve the orderly and expeditious disposition of cases.[4] That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals,[5] but even from language in this Court's opinion in *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, 176.[6] It also has the sanction of wide usage among the District Courts.[7] It would require a much clearer expression of

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[4] *E. g., Cage* v. *Cage*, 74 F. 2d 377; *Carnegie National Bank* v. *City of Wolf Point*, 110 F. 2d 569; *Hicks* v. *Bekins Moving & Storage Co.*, 115 F. 2d 406; *Zielinski* v. *United States*, 120 F. 2d 792; *American National Bank & Trust Co.* v. *United States*, 142 F. 2d 571; *Shotkin* v. *Westinghouse Elec. & Mfg. Co.*, 169 F. 2d 825; *Slavitt* v. *Meader*, 278 F. 2d 276.

[5] See, *e. g., Des Moines Union R. Co.* v. *District Court*, 170 Iowa 568, 153 N. W. 217; *Doughty* v. *Terminal R. Assn.*, 291 S. W. 2d 119 (Mo.); *Frytez* v. *Gruchacz*, 125 N. J. L. 630, 17 A. 2d 541; *Reed* v. *First National Bank*, 194 Ore. 45, 241 P. 2d 109; *Moshannon National Bank* v. *Iron Mountain Ranch Co.*, 45 Wyo. 265, 18 P. 2d 623; cf. *Hartford Accident & Indemnity Co.* v. *Sorrells*, 50 Ariz. 90, 69 P. 2d 240; *Thompson* v. *Foote*, 199 Ark. 474, 134 S. W. 2d 11; *Koon* v. *Barmettler*, 134 Colo. 221, 301 P. 2d 713.

[6] The issue in that case was whether a plaintiff was entitled to recover interest on a refund claim for customs duties paid under protest. In holding that interest for a 29-year period during which the suit remained dormant should not have been allowed, Mr. Justice Matthews, speaking for a unanimous Court, said: "This delay in prosecution would certainly have justified the court in dismissing the action on its own motion."

[7] In the more populous districts, where calendar congestion has become a severe problem, the District Courts, acting on their own initiative, have from time to time established special call calendars of "stale" cases for the purpose of dismissing those as to which neither adequate excuse for past delays nor reason for a further continuance appears. See, for example, the local rules of the following District Courts: Alaska Rule 16; Ariz. Rule 14; N. D. Cal. Rule 14; S. D. Cal. Rule 10 (d); Colo. Rule 24; Conn. Rule 15; Del. Rule 12; D. C. Rule 13; N. D. Fla. Rule 7; S. D. Fla. Rule 11; N. D. Ga. Rule 13 (c); Idaho Rule 8 (c); E. D. Ill. Rule 9; N. D. Ill. Gen. Rule 21; N. D. Ind. Rule 10; S. D. Ind. Rule 16; N. D. Iowa Rule 22; S. D. Iowa

purpose than Rule 41 (b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.

Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that "the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 246. But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct. The circumstances here were such as to dispense with the necessity for advance notice and hearing.

In addition, the availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60 (b)—which authorizes the reopening of cases in which final orders have been inadvisedly entered—renders the lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60 (b).

Rule 22; Kan. Rule 13; E. D. La. Gen. Rule 12; Me. Rule 15; Mass. Rule 12; W. D. Mich. Rule 8; Minn. Rule 3 (3); E. D. Mo. Rule 8 (g); Neb. Rule 18; Nev. Rule 9 (b); N. J. Rule 12; N. M. Rule 13; E. D. N. Y. Gen. Rule 23; N. D. N. Y. Gen. Rule 11; S. D. N. Y. Gen Rule 23; W. D. N. Y. Gen. Rule 11; N. D. Ohio Rule 6; S. D. Ohio Rule 8; E. D. Okla. Rule 12; E. D. Pa. Rule 18; M. D. Pa. Rule 21–A; S. Dak. Rule 9, § 4; S. D. Tex. Gen. Rule 22; Utah Rule 4 (c); E. D. Wash. Rule 23 (a); W. D. Wash. Rule 41; N. D. W. Va. Art. II, Rule 8; S. D. W. Va. Rule 8; E. D. Wis. Rule 11; W. D. Wis. Rule 15; Wyo. Rule 14.

Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion.[8]

II.

On this record we are unable to say that the District Court's dismissal of this action for failure to prosecute, as evidenced only partly by the failure of petitioner's counsel to appear at a duly scheduled pretrial conference, amounted to an abuse of discretion. It was certainly within the bounds of permissible discretion for the court to conclude that the telephone excuse offered by petitioner's counsel was inadequate to explain his failure to attend. And it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation (see note 2, *supra*),[9] that petitioner had been deliberately proceeding in dilatory fashion.

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected

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[8] Petitioner's contention that the District Court could not act in the conceded absence of any local rule covering the situation here is obviously unsound. Federal Rule of Civil Procedure 83 expressly provides that "in all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." In light of what has already been said we find no such inconsistency here.

[9] The record shows that this was the "oldest" case on the District Court's civil docket.

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agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." *Smith* v. *Ayer,* 101 U. S. 320, 326.[10]

We need not decide whether unexplained absence from a pretrial conference would *alone* justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff. For the District Court in this case relied on *all* the circumstances that were brought to its attention, including the earlier delays.[11]

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[10] Clients have been held to be bound by their counsels' inaction in cases in which the inferences of conscious acquiescence have been less supportable than they are here, and when the consequences have been more serious. See, *e. g., United States ex rel. Reid* v. *Richmond,* 295 F. 2d 83, 89–90; *Egan* v. *Teets,* 251 F. 2d 571, 577 n. 9; *United States* v. *Sorrentino,* 175 F. 2d 721. Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the *defendant.* Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition.

[11] The history of the case belies any suggestion that the delay was the fault of the defendant or solely of the district judge who first ruled erroneously on the motion for judgment on the pleadings. After the mandate of the Court of Appeals was filed with the District Court, the trial date that was set was vacated on the plaintiff's motion. Thereafter, the plaintiff failed to answer the defendant's interrogatories from August 17, 1957, until the day before the hearing on the order to show cause why the case should not be dismissed for want of

And while the Court of Appeals did not expressly rest its judgment on petitioner's failure to prosecute, it nonetheless set out the entire history of the case (including the statement made by the district judge's secretary that it was "the oldest civil case on the court docket"), noted that the District Court had considered the absence at the pretrial conference in light of "the history of this litigation" and "of all the circumstances surrounding counsel's action in the case," 291 F. 2d, at 545, and held that there was no abuse of discretion in dismissing the action "under the circumstances of this case." *Id.*, at 546. This obviously amounts to no broader a holding than that the failure to appear at a pretrial conference may, in the context of other evidence of delay, be considered by a District Court as justifying a dismissal with prejudice.[12]

Nor need we consider whether the District Court would have been abusing its discretion had it rejected a motion under Rule 60 (b) which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference. No such motion was ever

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prosecution—which was more than 19 months later. Although the next delay was occasioned by the defendant's motion, it was consented to by the plaintiff and there is no showing whatever that plaintiff ever made any effort to bring the case to trial. In fact, when the defendant submitted further interrogatories, plaintiff again moved to have the time to answer extended. Against this background, it is hardly surprising that the District Court concluded that the failure to appear for a pretrial conference was merely another delaying tactic.

[12] Even if the judgment of the Court of Appeals rested on the ground that counsel's "failure" to attend the pretrial conference sufficed by itself to justify the dismissal, it is our duty, without reaching the broader question, to sustain the District Court on its narrower holding if, as we decide, that holding was correct. *E. g.*, *Walling* v. *General Industries Co.*, 330 U. S. 545, 547; *Langnes* v. *Green*, 282 U. S. 531, 536–537; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435–436; see *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 88.

made, so that there is nothing in the record before us to indicate that counsel's failure to attend the pretrial conference was other than deliberate or the product of neglect.

Finally, this is not a case in which failure to comply with a court order "was due to inability fostered neither by . . . [petitioner's] own conduct nor by circumstances within its control." *Societe Internationale* v. *Rogers,* 357 U. S. 197, 211. Petitioner's counsel received due notice of the scheduling of the pretrial conference, and cannot now be heard to say that he could not have foreseen the consequences of his own default in attendance.

Affirmed.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE concurs, dissenting.

I think that the order of the District Court dismissing this case has no sound basis in law, in fact or in justice. The petitioner William Link brought an action to recover damages for alleged serious and permanent injuries suffered in a collision between his truck and a train operated by the respondent Wabash Railroad Company. The District Court dismissed that action without notice of any kind to the plaintiff Link or to his lawyer shortly after the lawyer failed to appear at a scheduled pretrial conference without what the trial judge regarded as an adequate excuse. The order of dismissal apparently purports to end petitioner's lawsuit and bar forever his right

to recover compensation for his injuries.[1] Under these circumstances, I think Judge Schnackenberg was entirely correct in his dissent to the opinion of the majority on the Court of Appeals for the Seventh Circuit upholding the dismissal when he said:

> "The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse." [2]

As I understand the opinion of the Court here, it upholds the District Court's dismissal order upon the ground of "want of prosecution" and "dilatoriness on the part of the plaintiff," making it unnecessary, as the Court views the case, to "decide whether unexplained absence from a pretrial conference would *alone* justify a dismissal with prejudice . . . ." I do not think that there is any basis in the record to support a dismissal of this case for "want of prosecution," for "dilatoriness on the part of the plaintiff" or for any other reason. In the first place, it seems to me

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[1] Since the order of dismissal here did not specify that it was without prejudice to the plaintiff's right to reinstitute the action, the dismissal operates as a judgment on the merits if Rule 41 (b) of the Federal Rules of Civil Procedure applies. Of course, if Rule 41 (b) is not the source of the power exercised here, as this Court seems to say, the order of dismissal would still end plaintiff's chance of recovery because his cause of action is now barred by the statute of limitations.

[2] 291 F. 2d 542, 548.

that the Court is in error when it suggests that both the District Court and the Court of Appeals relied on all the circumstances of this case, including its "earlier delays," to justify its dismissal with prejudice. It is true that the trial judge, though expressly basing his order entirely upon the failure of petitioner's lawyer to appear at the pretrial conference,[3] did mention the earlier history of the case as a ground for his action in a conversation with the respondent's lawyer just before the dismissal. But as I read the Court of Appeals' opinion, it neither relied upon nor even considered such a ground to support its judgment. The opening statement of the Court of Appeals' opinion certainly treated the case as resting not upon any general want of prosecution but instead wholly upon the failure of the lawyer to appear: "This is an appeal by plaintiff from an order of the district court entered October 12, 1960 dismissing this cause of action for failure of plaintiff's counsel to appear in court for a pre-trial conference scheduled for hearing on that date." [4] From this opening statement to the end of the majority opinion, I think that every argument and sentence in that opinion is directed to supporting the Court of Appeals' conclusion that the District Court had power to dismiss the case not for any "want of prosecution" but solely "as a sanction for disobedience of a court order." [5] Indeed, the only

[3] The order of dismissal stated as follows: "Pursuant to the inherent powers of the Court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed."

[4] 291 F. 2d, at 543.

[5] *Id.*, at 546. It is true that the Court of Appeals set out the history of the case but it made no attempt to rely upon that history to justify its judgment of affirmance. Its references to the "circumstances" of the case quoted in the Court's opinion simply cannot be magnified to indicate any such reliance.

reference to "want of prosecution" in the Court of Appeals' entire opinion is a parenthetical one to describe that court's holding in another case "where we upheld the dismissal of a cause under *another* local rule . . . ." [6] The plain import of the Court of Appeals' opinion is, to my mind, starkly revealed when its refusal to rely upon any theory of "want of prosecution" is considered in connection with the emphatic statements of Judge Schnackenberg in dissent: "Defendant's counsel makes no effort to rely upon want of prosecution as a ground for the involuntary dismissal. Obviously defendant is in no position to make such a contention, inasmuch as it caused the district court to vacate the order setting the case for trial on July 22, 1959, and continue the case." [7] It is impossible for me to believe that the majority of the Court of Appeals would have left this statement unchallenged if they had wanted to place any reliance at all upon "want of prosecution," "dilatoriness on the part of the plaintiff," or any ground other than their desire to approve a sanction upon Link's lawyer for his failure to appear at the pretrial conference.

Secondly, I think that this Court's decision to ignore the single ground upon which I believe that the Court of Appeals rested and to resurrect the "want of prosecution" theory from the trial court colloquy is wrong because this case has been a very live one from the date it was filed right up to this very moment. It is true that the case when dismissed had been pending for a long time, that is, from August 24, 1954, to the date of dismissal, October 12, 1960. But during this entire period of time, motions and activities of various kinds both by the lawyers and by the trial judge were taking place in the court. Certainly it would be impossible for anyone to suggest that the plaintiff Link

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[6] *Id.*, at 545. (Emphasis supplied.)

[7] *Id.*, at 547.

or his lawyer was responsible for the first three years of delay in the trial of the case. If responsibility is to be placed upon anyone for that delay, it must be placed upon the lawyers for the defendant and upon the trial judge. One month after the lawsuit was filed the defendant appeared and answered the complaint. Some months later the defendant filed a motion for judgment on the pleadings, arguing that the complaint failed to state a cause of action. On November 30, 1955, more than a year after the case was filed, the district judge granted the motion for judgment on the pleadings and entered his first dismissal of the case. On October 10, 1956, however, the Court of Appeals for the Seventh Circuit, in an opinion by Judge Schnackenberg, reversed this dismissal and remanded the case for trial.[8] The railroad then asked this Court to grant certiorari and review the Court of Appeals' holding but, on February 25, 1957, we denied certiorari.[9] At this stage, the case had been delayed for almost three years by an erroneous ruling of the trial judge made at the instance of the defendant's lawyers.

Upon remand, the District Court set the case for hearing on July 17, 1957, but this order was vacated and the cause continued "on motion of the plaintiff, and defendant not objecting . . . ." This continuance of the case by agreement between the plaintiff and the defendant of course provides not even a scintilla of evidence to support a dismissal for want of prosecution. Two months later, in an effort to buttress its defense for the approaching trial on the merits, the railroad filed interrogatories which the plaintiff answered. It is true that these interrogatories were not answered until some 19 months after they were filed. But there is no indication in the record that the defendant tried to get the interrogatories answered earlier. And every trial lawyer knows that the failure of a lawyer

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[8] 237 F. 2d 1.

[9] 352 U. S. 1003.

to answer interrogatories designed to solicit answers to be used against his client before those answers are demanded by the party filing the interrogatories is nothing more than a normal trial tactic of a lawyer who is trying to win the case for his client. On February 24, 1959, the trial judge on his own motion issued notice to the parties that he would dismiss the case for the second time on March 25, 1959, unless he ordered otherwise. After holding hearings on that date, however, and considering the arguments of counsel, the trial judge entered on June 4, 1959, an order retaining the case on his docket and setting it for trial on July 22, 1959. This action of the court in retaining the case on its docket shows that the trial judge certainly did not think at that time that the case was not being prosecuted. But before the case could be tried on July 22, the judge granted another continuance, this time at the request of the defendant with the plaintiff not objecting. Although this continuance at the request of the defendant, like the previous three-year delay directly attributable to the defendant and the court, doubtless contributed to the age of this case on the court's docket, I do not suppose (although I am not certain) that it is one of the "circumstances" which the Court refers to as justifying the dismissal of the case. On March 11, 1960, six years after this lawsuit was filed, the defendant's lawyers filed still more interrogatories for plaintiff to answer. One month and four days later after an extension of time granted by the trial court, these interrogatories were answered. This certainly does not seem like an extraordinary delay in answering interrogatories which apparently had taken the defendant six years to conceive and prepare.

Five months after the plaintiff answered defendant's March 11 interrogatories, the trial judge, again on his own motion, issued notice scheduling a pretrial conference on October 12, 1960. This was the pretrial

conference at which petitioner's lawyer failed to appear. But even that failure showed no inclination on the part of the plaintiff or his lawyer to abandon the lawsuit, for the lawyer called the clerk of the District Court over long-distance telephone and also talked to the trial judge's secretary on the morning of the day of the conference to explain why he could not be present on October 12 and to urge that the pretrial conference be passed over to the next day, October 13, to give him a chance to be present. It is true that the trial judge later refused to accept the lawyer's explanation and this ruling, if correct, indicates that the lawyer may have been guilty of some kind of breach of his responsibility to his client and to the court. It does not indicate, however, and it cannot by any stretch of the imagination be made to indicate that the lawyer, much less the plaintiff himself, was acting in the way people do who let their lawsuits die for "want of prosecution." The record shows that neither the lawyer nor the plaintiff himself was given any sort of notice by the judge or by his secretary that the request for a one-day postponement would be denied, even though the defendant's request for indefinite postponement had been granted only three months earlier. Nor did the lawyer or the plaintiff receive any notice that a failure to appear at the pretrial conference would result in the drastic sanction of dismissal of the case.[10] And I think that nothing short of clairvoyance would have enabled either of them to anticipate that this Court, or any court, would approve dismissal of the case for "want of prosecution."

Under the foregoing facts, it seems to me that it inflicts the grossest kind of injustice upon this petitioner to

[10] Thus, even under the Court's theory that a client must always be charged with " 'notice of all facts, notice of which can be charged upon the attorney,' " the plaintiff here cannot be charged with notice that his lawsuit would be dismissed upon the failure of his lawyer to appear at the pretrial conference.

uphold dismissal of his case on the ground that it was not being prosecuted. Of course it was. Counsel for both parties apparently were doing the best they could to bring the case to a successful conclusion for their respective clients. The "earlier delays" preceding the plaintiff's lawyer's failure to appear at the pretrial hearing, far from showing a "want of prosecution," actually strengthen the conclusion that the case was being prosecuted because by far the greater part of these delays was due to steps that were being taken in furtherance of the litigation. Only the two continuances in the case, one at the request of counsel for the plaintiff and the second at the request of counsel for the defendant, created delays not obviously related to that end. And if these delays are to be punished, I see no reason why the punishment should be limited to the plaintiff and his lawyer. I must say that it appears to me to be a sort of unequal justice that would punish the plaintiff or even his lawyer for "earlier delays" which undoubtedly were due in major part to an erroneous ruling of the trial judge with regard to the sufficiency of the pleadings, a continuance of the trial brought about at the request of the defendant, and the several motions that the defendant's counsel made along through the years in connection with interrogatories and additional interrogatories which were to be used for no purpose other than to defeat the plaintiff's actively prosecuted lawsuit.

Even assuming in the face of these plain facts, however, that all the blame for the six years' delay in this case could be laid at the feet of plaintiff's lawyer, it seems to me to be contrary to the most fundamental ideas of fairness and justice to impose the punishment for the lawyer's failure to prosecute upon the plaintiff who, so far as this record shows, was simply trusting his lawyer to take care of his case as clients generally do. The Court dismisses this whole question of punishing the plaintiff

Link for the alleged fault of his lawyer with the simple generalized statement: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." [11] One may readily accept

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[11] The Court does cite three cases in an effort to support this general proposition but none of those cases even suggests so harsh and expansive a rule. Moreover, they deal with situations so far removed from that presented here that their inapplicability as precedent for the conclusion reached in this case is apparent. *United States ex rel. Reid* v. *Richmond*, 295 F. 2d 83, and *United States* v. *Sorrentino*, 175 F. 2d 721, were criminal cases in each of which the defendant sought to upset his conviction on the ground that his lawyers had exercised poor judgment in handling one of the multitude of decisions that have to be made in the trial of every lawsuit. Reid's lawyers had failed to make an objection to one piece of evidence. The Court of Appeals, finding that this action "had much to commend it" as trial strategy, held that any objection to the evidence must be considered waived and that "Reid must be bound by what his lawyers did and his acquiescence in that course by his own testimony." 295 F. 2d, at 89–90. Even this holding provoked sharp dissent: "A holding that counsel assigned an accused may waive him into the electric chair seems in any event dubious." *Id.*, at 90–91. Sorrentino's lawyers waived his right to object to an order of the trial judge reducing the number of spectators at his trial. The Court of Appeals held that Sorrentino was bound by this waiver, saying: "Sorrentino did not at any time indicate to the court that he was not fully satisfied with the action which the trial judge had thus taken with his counsel's consent. It must, therefore, be concluded that he acquiesced in his counsel's judgment that his interests would not be prejudiced and indeed might be served by the reduction which the court ordered in the number of spectators at the trial." 175 F. 2d, at 723–724. Certainly no one could say of Link, as it was said of Sorrentino, that "his interests would not be prejudiced and indeed might be served" by the dismissal of his case. *Egan* v. *Teets*, 251 F. 2d 571, involved an allegation that the defendant's original appeal papers had been suppressed and the court held merely that the failure of the defendant's counsel to raise this point in the state courts after the defendant himself knew of the alleged suppression plus the failure of the defendant to offer any explanation for not raising the point in the state courts must be taken as waiving the point. 251 F. 2d, at 576–577. Here, it cannot

the statement that there are circumstances under which a client is responsible for the acts or omissions of his attorney. But it stretches this generalized statement too far to say that he must always do that. This case is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule.

Link filed an action in court, as was his right, alleging the infliction of serious injuries upon him by the railroad for which he sought damages. His case was delayed for three years because of the trial judge's erroneous ruling on a question of the technical sufficiency of the complaint, a ruling which, if it had not been reversed, would have frustrated the plaintiff's right to a trial on the merits. This ruling of course should never have been made, for it was plainly inconsistent with the whole philosophy underlying the modern liberal rules of procedure which govern civil trials in the federal courts. When the Court of Appeals upheld the complaint, reversed the trial court and remanded the case for trial, the parties engaged in a number of activities obviously designed to bring the case to trial. On at least two separate occasions, the plaintiff himself was called upon to respond to interrogatories submitted by the railroad. Under these circumstances, the plaintiff simply had no way of knowing that there was even the slightest danger that his potentially valuable lawsuit was going to be thrown out of court because of some default on the part of his lawyer. Quite the contrary, the plaintiff had every reason to believe that his lawyer, who had obtained reversal of the trial judge's

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be suggested that plaintiff's counsel has *waived* the plaintiff's right to have his lawsuit tried, since he has been holding on tenaciously to that right for eight years, four of which have been spent in trying to get the Court of Appeals and this Court to force the trial judge to give him a trial on the merits. Certainly, nothing in the opinion in *Egan* suggests that if the defendant had been able to allege and prove that his appeal papers had been suppressed by wrongful conduct on the part of his lawyer, he would nonetheless be bound by that conduct.

first erroneous order of dismissal in the Court of Appeals, was eminently well qualified to represent his interests and would do his best to win the lawsuit.

There surely can be no doubt that if the plaintiff's lawyer had gone into court without authority and asked the court to dismiss the case so as to bar any future suit from being filed, this Court would repudiate such conduct and give the plaintiff a remedy for the wrong so perpetrated against him. Or had the trial judge here, instead of putting an end to plaintiff's substantial cause of action, simply imposed a fine of several thousand dollars upon the plaintiff because of his lawyer's neglect, I cannot doubt that this Court would unanimously reverse such an unjust penalty. The result actually reached here, however, is that this Court condones a situation no different in fact from either of those described above. The plaintiff's cause of action is valuable property within the generally accepted sense of that word, and, as such, it is entitled to the protections of the Constitution. Due process requires that property shall not be taken away without notice and hearing. I do not see how the result here can be squared with that fundamental constitutional requirement.

Moreover, to say that the sins or faults or delinquencies of a lawyer must always be visited upon his client so as to impose tremendous financial penalties upon him, as here, is to ignore the practicalities and realities of the lawyer-client relationship.[12] Lawyers everywhere in this country are granted licenses presumably because of their skill, their integrity, their learning in the law and their

[12] I am not quite able to understand the Court's suggestion that "keeping this suit alive . . . would be visiting the sins of plaintiff's lawyer upon the *defendant*." I do not see how it can be regarded as a punishment to compel a person to try his lawsuit on its merits before an impartial judicial tribunal established under and operating in accordance with the Constitution of the United States.

dependability. While there may be some clients sophisticated enough in the affairs of the world to be able to select the good from the bad among this mass of lawyers throughout the country, this unfortunately cannot always be the case. The average individual called upon, perhaps for the first time in his life, to select a lawyer to try a lawsuit may happen to choose the best lawyer or he may happen to choose one of the worst. He has a right to rely at least to some extent upon the fact that a lawyer has a license. From this he is also entitled to believe that the lawyer has the ability to look out for his case and that he should leave the lawyer free from constraint in doing so. Surely it cannot be said that there was a duty resting upon Link, a layman plaintiff, to try to supervise the daily professional services of the lawyer he had chosen to represent him. How could he know, even assuming that it is true, that his lawyer was a careless man or that he would have an adverse effect upon the trial judge by failing to appear when ordered? How could he know or why should he be presumed to know that it was his duty to see that the many steps a lawyer needs to take to bring his case to trial had been taken by his lawyer? Why should a client be awakened to his lawyer's incapacity for the first time by a sudden brutal pronouncement of the court: "Your lawyer has failed to perform his duty in prosecuting your case and we are therefore throwing you out of court on your heels"? So far as this record shows, the plaintiff never received one iota of information of any kind, character or type that should have put him on notice as an ordinary layman that his lawyer was not doing his duty.[13]

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[13] The Court's suggestion that petitioner might have been able to file a motion under Rule 60 (b) "accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference" is no answer at all to the problem presented by the

Any general rule that clients must always suffer for the mistakes of their lawyers simply ignores all these problems. If a general rule is to be adopted, I think it would be far better in the interest of the administration of *justice*, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country.

The Court seems to find some reason for holding that this plaintiff can be penalized without notice because of a program certain courts have adopted to end congestion on their dockets by setting down long-pending cases for trial. It is of course desirable that the congestion on court dockets be reduced in every way possible consistent with the fair administration of justice. But that laudable objective should not be sought in a way which undercuts the very purposes for which courts were created—that is, to try cases on their merits and render judgments in accordance with the substantial rights of the parties. Where a case has so little merit that it is not being prosecuted, a trial court can of course properly dispose of it under fair constitutional procedures. There is not one fact in this record, however, from which an inference can be drawn that the case of Link against the Wabash Railroad Company is such a case. When we allow the desire to reduce court congestion to justify the sacrifice of substantial rights of the litigants in cases like this, we attempt to promote speed in administration, which is

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plaintiff's lack of notice. Whether the lawyer had "a more adequate explanation" or not, I think the plaintiff himself is entitled to due process before his property is taken from him.

desirable, at the expense of justice, which is indispensable to any court system worthy of its name.

Moreover, it seems plain to me that any attempt to cut down on court congestion by dismissing meritorious lawsuits is doomed to fail even in its misguided purpose of promoting speed in judicial administration. Litigants with meritorious lawsuits are not likely to accept unfair rulings of that kind without exhausting all available appellate remedies. Consequently, any reduction of trial court dockets accomplished by such dismissals will be more than offset by the increased burden on appellate courts. This case seems to me an excellent example of the sort of wholly unnecessary waste of judicial resources which can result from such overzealous protection of trial court dockets. The case has twice been before the Court of Appeals and has twice been brought to this Court as a result of "time-saving" rulings handed down by the trial judge.

It is true that by its ruling today the Court finally puts an end to this case and thus clears it from all federal dockets. But in view of the fact that the merits of the case have never been reached, I cannot believe that there should be too much rejoicing at this fact. The end result of the procedures adopted here has been that much time has been wasted and yet no justice has been done. I find it highly regrettable that the Court feels compelled to place its stamp of approval upon such procedures.

It may not be of much importance to anyone other than the plaintiff here and his family whether this case is tried on its merits or not. To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice.

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GILBERT *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 478. Argued April 10, 1962.—Decided June 25, 1962.

One who endorses a government check by signing the name of the payee and then his own, as agent, when in fact he has no such authority, is not thereby guilty of forgery under 18 U. S. C. § 495. Pp. 650–659.

(a) On the record in this case, including the judge's instructions, the jury's verdict of guilty might have been based on a finding that petitioner had purported to make an agency endorsement. Pp. 653–655.

(b) The word "forges" in § 495 was intended to have its common law meaning, and it does not include a purported but unauthorized agency endorsement. Pp. 655–659.

291 F. 2d 586, judgment vacated and cause remanded.

Fred Okrand and *Albert A. Dorn* argued the cause and filed briefs for petitioner.

Kirby W. Patterson argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Miller, J. William Doolittle* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Petitioner, an accountant whose business included acting for others in federal income tax matters, was charged in a thirty-five-count indictment with violations of 26 U. S. C. § 7206 (2), 18 U. S. C. § 1001, and 18 U. S. C. § 495, in that he had allegedly falsified his clients' returns (§ 7206 (2)), forged their endorsements on government tax-refund checks (§ 495), and, by endorsing such checks, had made false statements as to a matter within the jurisdiction of a government agency (§ 1001). The jury convicted on thirty-one counts and acquitted on four others.

On appeal, 291 F. 2d 586, 597, the judgment of conviction was set aside as to twenty-nine counts, and a new trial ordered, because the Court of Appeals found that evidence used by the Government in support of these counts had been illegally seized. The judgment as to the remaining two counts (Nos. 21 and 22), charging the petitioner with having forged the endorsements of Daniel H. Bartfield and Charline R. Bartfield on two government refund checks (18 U. S. C. § 495), was affirmed.[1]

It was stipulated at the trial that petitioner had endorsed in his own handwriting the two checks, made out to:

"Daniel H & Charlene R Bartfield
c/o R Milo Gilbert
519 Taft Building
Hollywood 28 Calif"

in the following manner:

"Daniel H. Bartfield
Charline R. Bartfield
R. Milo Gilbert, Trustee" [2]

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[1] 18 U. S. C. § 495 provides: "Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money . . . .

. . . . . .

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

Counts 21 and 22, which are identical in form, charge:

"On or about June 2, 1958, . . . the defendant R. Milo Gilbert knowingly and wilfully forged on United States Treasury Check . . . the endorsement and signature of the payees, Daniel H. and Chalrene R. Bartfield, for the purpose of obtaining and receiving said amount from the United States, its officers and agents."

[2] As payee of the two checks, Mrs. Bartfield's first name (Charline) was incorrectly spelled "Chalrene" on one and "Charlene" on the

Petitioner claimed that a written power of attorney, allegedly signed by both Bartfields in his office, authorized him to endorse tax-refund checks, and that "Trustee" after his name served to designate the particular bank account where he deposited and held all client-refunds until December of each year, against the possibility of there being a refund adjustment and until his contingent fee was settled. The Bartfields acknowledged that the signatures on the power of attorney were theirs, but disclaimed recollection of signing the instrument, and denied that they ever authorized petitioner orally or in writing to receive or endorse checks.[3]

On these premises the Court of Appeals, concluding that the evidence was sufficient to permit the jury to find that petitioner had endorsed the checks without authority (a conclusion which for present purposes we accept), held that one who endorses a government check by signing the name of the payee and then his own, as agent, when in fact he has no such authority, is guilty of forgery under § 495. We granted certiorari to consider the correctness of that view of the statute. 368 U. S. 816. While not mentioned in the petition for certiorari, though discussed in the briefs on the merits, the Court of Appeals for the Tenth Circuit, after the Court of Appeals' decision in the present case, held that "forgery" under § 495 does not embrace a purported, but misrepresented, agency endorsement (hereafter called simply an "agency endorsement"). *Selvidge* v. *United States*, 290 F. 2d 894. For reasons given in this opinion we agree with the Tenth Circuit.

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other, the former misspelling being carried over into the indictments. (Note 1, *supra*.) On one of the checks, petitioner's first name, as part of the payee inscription, was incorrectly spelled "Mile."

[3] No claim is made in this case that there was anything wrong with the Bartfields' income tax returns, to which the two refund checks related.

I.

At the outset we are met with the Government's suggestion that the statutory construction question need not be faced in this case. Before the Court of Appeals, as in the petition for certiorari, it was assumed by all that the two checks (which after the trial and before the case reached this Court had for some reason become mislaid) had been endorsed "*by* R. Milo Gilbert, Trustee." (Emphasis added.) That was a mistaken assumption for, as the checks themselves show (*supra,* p. 651), there was no "by" before "R. Milo Gilbert, Trustee."

Arguing that the jury might have found that the word "Trustee" after Gilbert's signature did not purport to indicate an agency endorsement, but was merely intended as a designation for routing the checks for deposit in one of Gilbert's "client" bank accounts, the Government suggests that a plain case of forgery is made out, and the agency-endorsement question is not in truth presented by the record.

We cannot so easily dispose of the case. For accepting the premise that the jury could have found that petitioner did not purport to act in a representative capacity when he endorsed the checks, it was surely also permissible for the jury to find that petitioner had purported to make an agency endorsement in both instances, and we are thus left to speculate on which theory its verdict in fact rested. Indeed the record before us seems to indicate that this aspect of the case was tried, at least primarily, on an agency-endorsement theory. The trial judge's instructions to the jury on this phase of the case were at best opaque. Having refused to instruct the jury that an agency endorsement was not forgery under § 495,[4] he at

[4] Petitioner's requested instructions pertinent to these two counts, both rejected, were:

1. "*One who* executes an instrument purporting on its face to be executed by him as agent of a principal named therein, when in fact

no point undertook to explain the difference between an agency and a nonagency endorsement.[5] Nor can we perceive any force in the Government's further suggestion that the jury's verdict on these two counts might have rested simply on the theory that in describing himself as "Trustee" the petitioner had made a fictitious endorsement, in that he had never occupied that status. Since the charge was that petitioner had forged the names of the Bartfields, not of their agent, this is but another way of describing the agency-endorsement version of the transaction.

In this posture of things the Government's proposal that we bypass decision of the question that brought the case here must be rejected. If an agency endorsement

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he has no authority for such principal to execute said instrument, is not guilty of forgery.

"*People* v. *Bendit*, 111 C 274 (1896); *International Finance Corporation* vs. *People's Bank of Keyser*, 27 F 2d 523 at 527. 4 I ALR 231 n."

2. "A check endorsed as follows—name of payee by other as trustee, does not constitute a forged instrument under U. S. C. Title 18, Section 495."

[5] Other than a dictionary definition of the word "trustee," the only instructions given the jury by the trial judge on this phase of the case were these:

"Where a tax accountant represents a taxpayer in the preparation of tax returns, there is no presumption of authority and the rights of the tax accountant must be governed by the terms of his employment, as applies to any other ordinary agency.

"Also, a power of attorney to prosecute a claim against the Government giving authority to receive a check in payment gives the agent no power to indorse and collect the check. But such authority may be given either orally or by writing."

No instructions specifically addressed to the elements of the offense under 18 U. S. C. § 1001 were given, and the Government does not here seek to support the conviction on the two forgery counts on the basis of that section.

does not constitute forgery under § 495, the petitioner is at least entitled to a new trial under proper jury instructions.

II.

The original predecessor of § 495 was enacted in 1823, 3 Stat. 771, and in respects here pertinent has throughout the intervening years been in substantially the same form as § 495. There is no significant legislative history illuminating § 495 or any of its predecessors. In deciding whether "forges" under § 495 embraces agency endorsements, it is therefore important to inquire, as the Government recognizes, into the common-law meaning of forgery at the time the 1823 statute was enacted. For in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law sense.

In 1847 it was decided in the English case of *Regina* v. *White,* 2 Car. & K. 404, 175 Eng. Rep. 167 (Nisi Prius, Book 6), that "indorsing a bill of exchange under a false assumption of authority to indorse it per procuration, is not forgery, there being no false making." [6] 2 Car. & K., at 412, 175 Eng. Rep., at 170 (Nisi Prius, Book 6). This to be sure was some twenty-four years after the 1823 predecessor of § 495 came on the books. The Government says that this English decision should be regarded as but an ill-advised and temporary departure from the earlier common law which was "soon recognized" and remedied by the passage of the Forgery Act of 1861, 24 & 25 Vict., c. 98, § 24, defining forgery to include

[6] The trial judge, in summation, had instructed the jury "that if they were of opinion that the prisoner, at the time when he signed this indorsement, had wilfully misrepresented that he came from Mr. Tomlinson [the defendant's former employer] with intent to defraud him or the bankers, and had no authority from Mr. Tomlinson, they ought to find him guilty." 2 Car. & K., at 406, 175 Eng. Rep., at 168 (Nisi Prius, Book 6).

unauthorized signings "per procuration," with intent to defraud.[7] The Government draws from earlier English authority, 2 East, Pleas of the Crown, 850–859 (1803); 1 Hawkins, Pleas of the Crown, c. 70; Coke, Third Institute (1797 ed.) 169; 4 Blackstone, Commentaries, 247, the conclusion that agency endorsements did constitute forgery under the common law as it existed when the 1823 American statute was passed.

This view cannot readily be accepted. The fifteen judges who participated in *Regina* v. *White* unanimously decided that case as they did only after considering the earlier English authorities. Such of those authorities as are now relied on by the Government are by no means as clear as the Government would have them. Thus Lord East's comments, *supra*, at p. 852, were: "*Forgery* at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit. . . . [The ancient and modern authorities] all consider the offence as consisting in the false and fraudulent making or altering of such and such instruments." (Emphasis in original.) Coke,[8] Hawkins,[9] and

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[7] The statute presently in effect in England, the Forgery Act of 1913, 3 & 4 Geo. 5, c. 27, § 1 (2), provides that a document is forged "if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making . . . ."

[8] "Lord Coke [Third Institute 169] indeed seems to confine it [forgery] in strictness to an act done *in the name of another*, but this was long ago agreed . . . to be too narrow a definition." 2 East, Pleas of the Crown, 852 (1803). Hawkins interpreted Coke to say that even the alteration of a deed, by adding a 0 to 500 to make it 5000, "may more properly be called a false than a forged Writing, because it is not forged in the Name of another, nor his Seal nor Hand counterfeited." 1 Hawkins, Pleas of the Crown, c. 70, § 2, at 183 (1762).

[9] "Forgery by the Common Law seemeth to be an Offence in falsly and fraudulently making or altering any Matter of Record, or any

Blackstone,[10] who are also cited by the Government, are no more persuasive towards the Government's view. The more inclusive definition of forgery contained in the English statutes, *supra*, p. 655 and note 7, proves not that *Regina* v. *White* was mistaken in its view of the common law but only that a broader definition was deemed desirable by Parliament. And finally, the *Regina* v. *White* view of forgery at common law was early accepted in a federal case as representing the English common law. *In re Extradition of Tully*, 20 F. 812. The same view of forgery has since been followed in most of the state and federal courts in this country. See, *e. g.*, *People* v. *Bendit*, 111 Cal. 274, 276–280, 43 P. 901, 902; *Pasadena Investment Co.* v. *Peerless Casualty Co.*, 132 Cal. App. 2d 328, 331, 282 P. 2d 124, 125; *State* v. *Lamb*, 198 N. C. 423, 425–426, 152 S. E. 154, 155–156; *Dexter Horton Nat. Bank* v. *United States Fidelity & Guaranty Co.*, 149 Wash. 343, 346–351, 270 P. 799, 800–802; *Greathouse* v. *United States*, 170 F. 2d 512, 514; *Marteney* v. *United States*, 216 F. 2d 760, 763–764.

The foregoing considerations combine to lead us to the conclusion that "forge" in § 495 should not be taken to include an agency endorsement. So the Court of Appeals for the Tenth Circuit has held in *Selvidge* v. *United States*, *supra*, the only case in the lower federal courts

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other authentick Matter of a publick Nature . . . ." 1 Hawkins, Pleas of the Crown, c. 70, § 1, p. 182 (1762). "Also the Notion of Forgery doth not seem so much to consist in the counterfeiting a Man's Hand and Seal, which may often be done innocently, but in the endeavouring to give an Appearance of Truth to a mere Deceit and Falsity, and . . . to impose that upon the World as the solemn Act of another . . . ." *Id.*, § 2, at 183.

[10] "Forgery, or the *crimen falsi*, . . . may with us be defined (at common law) to be, 'the fraudulent making or alteration of a writing to the prejudice of another man's right' . . . ." 4 Blackstone, Commentaries (Christian ed. 1809), 247–248.

squarely dealing with the point,[11] and we perceive no sound reason for rejecting its conclusion. We find no more persuasive than did the Court of Appeals in *Selvidge* (290 F. 2d, at 896 and note 2) the scattered federal cases relied on by the Government in support of the opposite view.[12] Nor are we impressed with the argument that "forge" in § 495 should be given a broader scope than its common-law meaning because contained in a statute aimed at protecting the Government against fraud.[13] Other federal statutes are ample enough to protect the Government against fraud and false statements. See 18 U. S. C. §§ 1001–1026. Still further, it is significant that cases construing "forge" under other federal statutes have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings. See, *e. g., Greathouse* v. *United States, supra* (construing 18 U. S. C. § 2314); *Wright* v. *United States,* 172 F. 2d 310, 311–312 (construing 18 U. S. C. § 2314); *Marteney* v. *United States, supra* (construing 18 U. S. C. § 2314); *United States* v. *Carabasi,* 292 F. 2d 362, 364 (construing 7 U. S. C. § 1622 (h)). Where the "falsity lies in the representation of facts, not in the genuineness of execution," it is not forgery. *Marteney* v. *United States, supra,* at 763–764. Of course, Congress could

[11] We do not read the early case of *United States* v. *Osgood,* 27 Fed. Cas. No. 15,971a, 362, decided under the 1823 statute, as pointing to a different conclusion.

[12] *Ex parte Hibbs,* 26 F. 421; *Yeager* v. *United States,* 59 App. D. C. 11, 32 F. 2d 402; *United States* v. *Tommasello,* 64 F. Supp. 467; *Quick Service Box Co.* v. *St. Paul Mercury Indemnity Co.,* 95 F. 2d 15.

[13] The fact that the original 1823 statute had a proviso disclaiming any purpose to preempt state criminal jurisdiction in respect of matters covered by the Federal Act does not of course, as the Government suggests, indicate that "forgery" had a wider meaning in federal than under state law. Cf. 18 U. S. C. § 3231, where a similar general proviso relating to all statutes in Title 18 is now found.

broaden the concept of "federal" forgery by statutory definition. We hold only that it has not yet done so.

We conclude that petitioner's conviction cannot be sustained upon this record. However, since we are not prepared at this stage to say that the Government might not be entitled to succeed on these two counts of the indictment upon the theory that petitioner never signed the Bartfields' names in a representative capacity, we think the way should be left open for a retrial of them under proper jury instructions, in conjunction with the other counts already remanded by the Court of Appeals, within a reasonable time. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE STEWART dissent, believing that one who endorses a check in the name of the payee without authority to do so is guilty of forgery under 18 U. S. C. § 495, whether or not the forger falsely purports to have signed the payee's name as an authorized agent.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

ROBINSON *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 554. Argued April 17, 1962.—Decided June 25, 1962.

A California statute makes it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction thereunder, the California courts construed the statute as making the "status" of narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. *Held:* As so construed and applied, the statute inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Pp. 660–668.

Reversed.

Samuel Carter McMorris argued the cause and filed briefs for appellant.

William E. Doran argued the cause for appellee. With him on the brief were *Roger Arnebergh* and *Philip E. Grey*.

MR. JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." [1] This

[1] The statute is § 11721 of the California Health and Safety Code. It provides:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced

appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms,

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to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics . . . .[3] That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. . . . To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is

[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. See note 1, *supra*.

chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed *either* that he was of the "status" *or* had committed the "act" denounced by the statute.[4] "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics . . . ." [5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged."

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[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had" in this case. 28 U. S. C. § 1257. See *Smith* v. *California,* 361 U. S. 147, 149; *Edwards* v. *California,* 314 U. S. 160, 171. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U. S. 918, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in *Whipple* v. *Martinson,* 256 U. S. 41, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U. S., at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the viola-

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

tion of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

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[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as though the precise words had been written" into the statute. *Terminiello* v. *Chicago,* 337 U. S. 1, 4. "We can only take the statute as the state courts read it." *Id.,* at 6. Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence . . . by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See *Francis* v. *Resweber,* 329 U. S. 459.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder* v. *United States*, 268 U. S. 5, 18.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. See Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association 1008 (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I wish to make more explicit the reasons why I think it is "cruel and unusual" punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict.

In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, The Mentally Ill in America (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." Action for Mental Health (1961), p. 26.

As stated by Dr. Isaac Ray many years ago:

> "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." Treatise on the Medical Jurisprudence of Insanity (5th ed. 1871), p. 56.

Today we have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people

may be confined either for treatment or for the protection of society, they are not branded as criminals.

Yet terror and punishment linger on as means of dealing with some diseases. As recently stated:

> ". . . the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking, and near-drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock. All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor." Action for Mental Health (1961), pp. 27–28.

That approach continues as respects drug addicts. Drug addiction is more prevalent in this country than in any other nation of the western world.[1] S. Rep. No. 1440, 84th Cong., 2d Sess., p. 2. It is sometimes referred to as "a contagious disease." *Id.*, at p. 3. But those living in a world of black and white put the addict in the cate-

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[1] Drug Addiction: Crime or Disease? (1961), p. XIV. ". . . even if one accepts the lowest estimates of the number of addicts in this country there would still be more here than in all the countries of Europe combined. Chicago and New York City, with a combined population of about 11 million or one-fifth that of Britain, are ordinarily estimated to have about 30,000 addicts, which is from thirty to fifty times as many as there are said to be in Britain."

gory of those who could, if they would, forsake their evil ways.

The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. Earl Ubell recently wrote:

> "In Bellevue Hospital's nurseries, Dr. Saul Krugman, head of pediatrics, has been discovering babies minutes old who are heroin addicts.
>
> "More than 100 such infants have turned up in the last two years, and they show all the signs of drug withdrawal: irritability, jitters, loss of appetite, vomiting, diarrhea, sometimes convulsions and death.
>
> " 'Of course, they get the drug while in the womb from their mothers who are addicts,' Dr. Krugman said yesterday when the situation came to light. 'We control the symptoms with Thorazine, a tranquilizing drug.
>
> " 'You should see some of these children. They have a high-pitched cry. They appear hungry but they won't eat when offered food. They move around so much in the crib that their noses and toes become red and excoriated.'
>
> "Dr. Lewis Thomas, professor of medicine at New York University-Bellevue, brought up the problem of the babies Monday night at a symposium on narcotics addiction sponsored by the New York County Medical Society. He saw in the way the babies respond to treatment a clue to the low rate of cure of addiction.
>
> " 'Unlike the adult addict who gets over his symptoms of withdrawal in a matter of days, in most cases,' Dr. Thomas explained later, 'the infant has to be treated for weeks and months. The baby continues to show physical signs of the action of the drugs.

> " 'Perhaps in adults the drugs continue to have physical effects for a much longer time after withdrawal than we have been accustomed to recognize. That would mean that these people have a physical need for the drug for a long period, and this may be the clue to recidivism much more than the social or psychological pressures we've been talking about.' " N. Y. Herald Tribune, Apr. 25, 1962, p. 25, cols. 3–4.

The addict is under compulsions not capable of management without outside help. As stated by the Council on Mental Health:

> "Physical dependence is defined as the development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administration of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome. When an addict says that he has a habit, he means that he is physically dependent on a drug. When he says that one drug is habit-forming and another is not, he means that the first drug is one on which physical dependence can be developed and that the second is a drug on which physical dependence cannot be developed. Physical dependence is a real physiological disturbance. It is associated with the development of hyperexcitability in reflexes mediated through multineurone arcs. It can be induced in animals, it has been shown to occur in the paralyzed hind limbs of addicted chronic spinal dogs, and also has been produced in dogs whose cerebral cortex has been removed." Report on Narcotic Addiction, 165 A. M. A. J. 1707, 1713.

Some say the addict has a disease. See Hesse, Narcotics and Drug Addiction (1946), p. 40 *et seq.*

Others say addiction is not a disease but "a symptom of a mental or psychiatric disorder." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 8. And see Present Status of Narcotic Addiction, 138 A. M. A. J. 1019, 1026; Narcotic Addiction, Report to Attorney General Brown by Citizens Advisory Committee to the Attorney General on Crime Prevention (1954), p. 12; Finestone, Narcotics and Criminality, 22 Law & Contemp. Prob. 69, 83–85 (1957).

The extreme symptoms of addiction have been described as follows:

> "To be a confirmed drug addict is to be one of the walking dead . . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a billious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life . . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead." N. Y. L. J., June 8, 1960, p. 4, col. 2.

Some States punish addiction, though most do not. See S. Doc. No. 120, 84th Cong., 2d Sess., pp. 41, 42. Nor does the Uniform Narcotic Drug Act, first approved in 1932 and now in effect in most of the States. Great Britain, beginning in 1920 placed "addiction and the

treatment of addicts squarely and exclusively into the hands of the medical profession." Lindesmith, The British System of Narcotics Control, 22 Law & Contemp. Prob. 138 (1957). In England the doctor "has almost complete professional autonomy in reaching decisions about the treatment of addicts." Schur, British Narcotics Policies, 51 J. Crim. L. & Criminology 619, 621 (1961). Under British law "addicts are patients, not criminals." *Ibid.* Addicts have not disappeared in England but they have decreased in number (*id.*, at 622) and there is now little "addict-crime" there. *Id.*, at 623.

The fact that England treats the addict as a sick person, while a few of our States, including California, treat him as a criminal, does not, of course, establish the unconstitutionality of California's penal law. But we do know that there is "a hard core" of "chronic and incurable drug addicts who, in reality, have lost their power of self-control." S. Rep. No. 2033, 84th Cong., 2d Sess., p. 8. There has been a controversy over the type of treatment—whether enforced hospitalization or ambulatory care is better. H. R. Rep. No. 2388, 84th Cong., 2d Sess., pp. 66–68. But there is little disagreement with the statement of Charles Winick: "The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them." Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9 (1957). The abstinence symptoms and their treatment are well known. *Id.*, at 10–11. Cure is difficult because of the complex of forces that make for addiction. *Id.*, at 18–23. "After the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts from four to six months." *Id.*, at 23–24. Dr. Marie Nyswander tells us that normally a drug addict

must be hospitalized in order to be cured. The Drug Addict as a Patient (1956), p. 138.

The impact that an addict has on a community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[2] As Charles Winick has said:

> "There can be no single program for the elimination of an illness as complex as drug addiction, which

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[2] "The sick addict must be quarantined until cured, and then carefully watched until fully rehabilitated to a life of normalcy." Narcotics, N. Y. Leg. Doc. No. 27 (1952), p. 116. And see the report of Judge Morris Ploscowe printed as Appendix A, Drug Addiction: Crime or Disease? (1961), pp. 18, 19–20, 21.

"These predilections for stringent law enforcement and severer penalties as answers to the problems of drug addiction reflect the philosophy and the teachings of the Bureau of Narcotics. For years the Bureau has supported the doctrine that if penalties for narcotic drug violations were severe enough and if they could be enforced strictly enough, drug addiction and the drug traffic would largely disappear from the American scene. This approach to problems of narcotics has resulted in spectacular modifications of our narcotic drug laws on both the state and federal level. . . .

. . . . . .

"Stringent law enforcement has its place in any system of controlling narcotic drugs. However, it is by no means the complete answer to American problems of drug addiction. In the first place it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences. The belief that fear of punishment is a vital factor in deterring an addict from using drugs rests upon a superficial view of the drug addiction process and the nature of drug addiction. . . .

". . . The very severity of law enforcement tends to increase the price of drugs on the illicit market and the profits to be made therefrom. The lure of profits and the risks of the traffic simply challenge the

carries so much emotional freight in the community. Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and a thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to come to terms with this problem. The addict should be viewed as a sick person, with a chronic disease which requires almost emergency action." 22 Law & Contemp. Prob. 9, 33 (1957).

The Council on Mental Health reports that criminal sentences for addicts interferes "with the possible treatment and rehabilitation of addicts and therefore should be abolished." 165 A. M. A. J. 1968, 1972.

The command of the Eighth Amendment, banning "cruel and unusual punishments," stems from the Bill of Rights of 1688. See *Francis* v. *Resweber,* 329 U. S. 459, 463. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Ibid.*

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler,* 136 U. S. 436, 446), quartering, the rack and thumbscrew (see *Chambers* v. *Florida,* 309 U. S. 227, 237), and in some circumstances even solitary confinement (see *Medley,* 134 U. S. 160, 167–168).

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ingenuity of the underworld peddlers to find new channels of distribution and new customers, so that profits can be maintained despite the risks involved. So long as a non-addict peddler is willing to take the risk of serving as a wholesaler of drugs, he can always find addict pushers or peddlers to handle the retail aspects of the business in return for a supply of the drugs for themselves. Thus, it is the belief of the author of this report that no matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes."

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present.[3] A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." See *O'Neil* v. *Vermont,* 144 U. S. 323, 331. So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah,* 99 U. S. 130, 135. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man. See *O'Neil* v. *Vermont, supra,* at 340 (dissenting opinion); *Francis* v. *Resweber, supra,* at 473 (dissenting opinion).

By the time of Coke, enlightenment was coming as respects the insane. Coke said that the execution of a madman "should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." 6 Coke's Third Inst. (4th ed. 1797), p. 6. Blackstone endorsed this view of Coke. 4 Commentaries (Lewis ed. 1897), p. 25.

We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society.[4] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize.

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[3] See 3 Catholic U. L. Rev. 117 (1953); 31 Marq. L. Rev. 108 (1947); 22 St. John's L. Rev. 270 (1948); 2 Stan. L. Rev. 174 (1949); 33 Va. L. Rev. 348 (1947); 21 Tul. L. Rev. 480 (1947); 1960 Wash. U. L. Q., p. 160.

[4] As to the insane, see *Lynch* v. *Overholser,* 369 U. S. 705; note, 1 L. R. A. (N. S.), p. 540 *et seq.*

Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. Contrary to my Brother CLARK, I think the means must stand constitutional scrutiny, as well as the end to be achieved. A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. Indeed, in § 5350 of the Welfare and Institutions Code, California has expressly provided for civil proceedings for the commitment of habitual addicts. Section 11721 is, in reality, a direct attempt to punish those the State cannot commit civilly.[5] This prosecution has no relationship to the curing

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[5] The difference between § 5350 and § 11721 is that the former aims at treatment of the addiction, whereas § 11721 does not. The latter cannot be construed to provide treatment, unless jail sentences, without more, are suddenly to become medicinal. A comparison of the lengths of confinement under the two sections is irrelevant, for it is the purpose of the confinement that must be measured against the constitutional prohibition of cruel and unusual punishments.

Health and Safety Code § 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under § 11721. Section 11391, so far as here relevant, provides:

"No person shall treat an addict for addiction except in one of the following:

"(a) An institution approved by the Board of Medical Examiners, and where the patient is at all times kept under restraint and control.

"(b) A *city or county jail.*

"(c) A state prison.

"(d) A state narcotic hospital.

"(e) A state hospital.

"(f) A county hospital.

"This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury, or the infirmities of old age." (Emphasis supplied.)

Section 11391 does not state that any treatment is required for either part or the whole of the mandatory 90-day prison term imposed by § 11721. Should the necessity for treatment end before the 90-day

of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.

MR. JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot

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term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to § 11391 will not solve or alleviate the problem of cruel and unusual punishment presented by this case.

*The jury was instructed that "it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is *either* that the defendant did use a narcotic in Los Angeles County, *or* that while in the City of Los Angeles he was addicted to the use of narcotics." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered [*sic*] by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, *Terminiello* v. *Chicago*, 337 U. S. 1, 4, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court finds § 11721 of California's Health and Safety Code, making it an offense to "be addicted to the use of narcotics," violative of due process as "a cruel and unusual punishment." I cannot agree.

The statute must first be placed in perspective. California has a comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure. It is the product of an extensive investigation made in the mid-Fifties by a committee of distinguished scientists, doctors, law enforcement officers and laymen appointed by the then Attorney General, now Governor, of California. The committee filed a detailed study entitled "Report on Narcotic Addiction" which was given considerable attention. No recommendation was made therein for the repeal of § 11721, and the State Legislature in its discretion continued the policy of that section.

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. The

Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under § 11721 of the Health and Safety Code which is at issue here. It provides that a person found to be addicted to the use of narcotics shall serve a term in the county jail of not less than 90 days nor more than one year, with the minimum 90-day confinement applying in all cases without exception. Provision is made for parole with periodic tests to detect readdiction.

The trial court defined "addicted to narcotics" as used in § 11721 in the following charge to the jury:

> "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

There was no suggestion that the term "narcotic addict" as here used included a person who acted without volition or who had lost the power of self-control. Although the section is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows § 11721: "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." California Health and Safety Code § 11728.

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital.

California Welfare and Institutions Code § 5355. For the purposes of this provision, a narcotic addict is defined as

> "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code." California Welfare and Institutions Code § 5350. (Emphasis supplied.)

This proceeding is clearly civil in nature with a purpose of rehabilitation and cure. Significantly, if it is found that a person committed under § 5355 will not receive substantial benefit from further hospital treatment and is not dangerous to society, he may be discharged—but only after a minimum confinement of three months. § 5355.1.

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

In the instant case the proceedings against the petitioner were brought under the volitional-addict section. There was testimony that he had been using drugs only four months with three to four relatively mild doses a

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week. At arrest and trial he appeared normal. His testimony was clear and concise, being simply that he had never used drugs. The scabs and pocks on his arms and body were caused, he said, by "overseas shots" administered during army service preparatory to foreign assignment. He was very articulate in his testimony but the jury did not believe him, apparently because he had told the clinical expert while being examined after arrest that he had been using drugs, as I have stated above. The officer who arrested him also testified to like statements and to scabs—some 10 or 15 days old—showing narcotic injections. There was no evidence in the record of withdrawal symptoms. Obviously he could not have been committed under § 5355 as one who had completely "lost the power of self-control." The jury was instructed that narcotic "addiction" as used in § 11721 meant strongly disposed to a taste or practice or habit of its use, indicated by the use of narcotics often or daily. A general verdict was returned against petitioner, and he was ordered confined for 90 days to be followed by a two-year parole during which he was required to take periodic Nalline tests.

The majority strikes down the conviction primarily on the grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status. This viewpoint is premised upon the theme that § 11721 is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the *only treatment* for narcotics addiction—that anything less is a punishment denying due process. California has found otherwise after a study which I suggest was more extensive than that conducted by the Court.

Even in California's program for hospital commitment of nonvolitional narcotic addicts—which the majority approves—it is recognized that some addicts will not respond to or do not need hospital treatment. As to these persons its provisions are identical to those of § 11721—confinement for a period of not less than 90 days. Section 11721 provides this confinement as treatment for the volitional addicts to whom its provisions apply, in addition to parole with frequent tests to detect and prevent further use of drugs. The fact that § 11721 might be labeled "criminal" seems irrelevant,* not only to the majority's own "treatment" test but to the "concept of ordered liberty" to which the States must attain under the Fourteenth Amendment. The test is the overall purpose and effect of a State's act, and I submit that California's program relative to narcotic addicts—including both the "criminal" and "civil" provisions—is inherently one of treatment and lies well within the power of a State.

However, the case in support of the judgment below need not rest solely on this reading of California law. For even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to § 11721, that provision still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society *in themselves,* the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. California courts have taken judicial notice that "the inordinate use of a narcotic drug tends

*Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position." *People* v. *Jaurequi*, 142 Cal. App. 2d 555, 561, 298 P. 2d 896, 900 (1956). Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?

It is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control. When dealing with involuntary addicts California moves only through § 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, "status" offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed. 1916), 170. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.

Nor is the conjecture relevant that petitioner may have acquired his habit under lawful circumstances. There was no suggestion by him to this effect at trial, and surely the State need not rebut all possible lawful sources of addiction as part of its prima facie case.

The argument that the statute constitutes a cruel and unusual punishment is governed by the discussion above.

Properly construed, the statute provides a treatment rather than a punishment. But even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable when compared to the provisions for 3 to 24 months' confinement under § 5355 which the majority approves.

I would affirm the judgment.

MR. JUSTICE WHITE, dissenting.

If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case. But this record presents neither situation. And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state statutes, where possible, in a manner saving their constitutionality.[1]

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[1] It has repeatedly been held in this Court that its practice will not be "to decide any constitutional question in advance of the necessity for its decision . . . or . . . except with reference to the particular facts to which it is to be applied," *Alabama State Federation* v. *McAdory*, 325 U. S. 450, 461, and that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional interpretation of the language. Thus, the Court recently reaffirmed the principle in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 370: "When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. ' "Constitutional questions are not to be dealt with abstractly". . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court,[2] addiction *is* the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[3] California is entitled to have its statute and the record so read, particularly where the State's only purpose in allowing prosecutions for addiction was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use

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construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' *Allen-Bradley Local* v. *Wisconsin Board*, 315 U. S. 740, at 746."

[2] The court instructed the jury that, "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

[3] This is not a case where a defendant is convicted "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." The evidence was that appellant lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest. According to the State's expert, no needle mark or scab found on appellant's arms was newer than 3 days old and the most recent mark might have been as old as 10 days, which was consistent with appellant's own pretrial admissions. The State's evidence was that appellant had used narcotics at least 7 times in the 15 days immediately preceding his arrest.

where there is no precise evidence of the county where the use took place.[4]

Nor do I find any indications in this record that California would apply § 11721 to the case of the helpless addict. I agree with my Brother CLARK that there was no evidence at all that appellant had lost the power to control his acts. There was no evidence of any use within 3 days prior to appellant's arrest. The most recent marks might have been 3 days old or they might have been 10

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[4] The typical case under the narcotics statute, as the State made clear in its brief and argument, is the one where the defendant makes no admissions, as he did in this case, and the only evidence of use or addiction is presented by an expert who, on the basis of needle marks and scabs or other physical evidence revealed by the body of the defendant, testifies that the defendant has regularly taken narcotics in the recent past. See, *e. g.*, *People* v. *Williams*, 164 Cal. App. 2d 858, 331 P. 2d 251; *People* v. *Garcia*, 122 Cal. App. 2d 962, 266 P. 2d 233; *People* v. *Ackles*, 147 Cal. App. 2d 40, 304 P. 2d 1032. Under the local venue requirements, a conviction for simple use of narcotics may be had only in the county where the use took place, *People* v. *Garcia, supra*, and in the usual case evidence of the precise location of the use is lacking. Where the charge is addiction, venue under § 11721 of the Health and Safety Code may be laid in any county where the defendant is found. *People* v. *Ackles, supra*, 147 Cal. App. 2d, at 42–43, 304 P. 2d, at 1033, distinguishing *People* v. *Thompson*, 144 Cal. App. 2d 854, 301 P. 2d 313. Under California law a defendant has no constitutional right to be tried in any particular county, but under statutory law, with certain exceptions, "an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred." *People* v. *Megladdery*, 40 Cal. App. 2d 748, 762, 106 P. 2d 84, 92. A charge of narcotics addiction is one of the exceptions and there are others. See, *e. g.*, §§ 781, 784, 785, 786, 788, Cal. Penal Code. Venue is to be determined from the evidence and is for the jury, but it need not be proved beyond a reasonable doubt. *People* v. *Megladdery, supra*, 40 Cal. App. 2d, at 764, 106 P. 2d, at 93. See *People* v. *Bastio*, 55 Cal. App. 2d 615, 131 P. 2d 614; *People* v. *Garcia, supra*. In reviewing convictions in narcotics cases, appellate courts view the evidence of venue "in the light most favorable to the judgment." *People* v. *Garcia, supra*.

days old. The appellant admitted before trial that he had last used narcotics 8 days before his arrest. At the trial he denied having taken narcotics at all. The uncontroverted evidence was that appellant was not under the influence of narcotics at the time of his arrest nor did he have withdrawal symptoms. He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings under another statute which requires a finding that the addict has lost the power of self-control. In my opinion, on this record, it was within the power of the State of California to confine him by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.[5]

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

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[5] Health and Safety Code § 11391 expressly permits and contemplates the medical treatment of narcotics addicts confined to jail.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

I respectfully dissent.

CONTINENTAL ORE CO. ET AL. *v.* UNION CARBIDE & CARBON CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 304. Argued April 16–17, 1962.—Decided June 25, 1962.

Petitioners sued respondents under § 4 of the Clayton Act to recover treble damages, alleging that respondents had violated §§ 1 and 2 of the Sherman Act by conspiring to restrain, by monopolizing, and by attempting and conspiring to monopolize, trade and commerce in ferrovanadium and vanadium oxide. The jury brought in a verdict for respondents, and petitioners appealed, contending that the District Court erred in excluding various items of evidence, in giving certain instructions to the jury, in refusing to give other instructions and in other rulings. The Court of Appeals held that there was insufficient evidence to justify a jury's finding that respondents' illegal acts were the cause of petitioners' failure in the vanadium business and that, therefore, a verdict should have been directed for respondents. *Held:* The judgment is vacated and the case is remanded for a new trial. Pp. 691–710.

1. In concluding that there should have been a directed verdict for respondents, the Court of Appeals erred in failing to view the evidence in the light most favorable to petitioners and to give petitioners the benefit of all inferences which the evidence fairly supported; and it erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to petitioners' business. It was the jury's function to weigh the evidence and the inferences to be drawn therefrom and to come to an ultimate conclusion as to the facts. Pp. 696–702.

2. The District Court erred in rejecting petitioners' offer to prove that they had been excluded from the Canadian market by a wholly owned subsidiary of one of the respondents, which was acting as the exclusive purchasing agent for the wartime Office of Metals Controller of the Canadian Government, but which allegedly operated in this connection under the control and direction of its parent corporation for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry in the United States. This offer of proof was relevant evidence of a violation of the Sherman Act charged in the complaint, and it was not inadmissible on the ground that the subsidiary corporation was acting as an arm of the Canadian Government. Pp. 702–708.

3. The District Court committed several trial errors which should not be repeated in a new trial. Pp. 708–710.

(a) The District Court erred in charging the jury that, in the context of the facts alleged in this case, a conspiracy must be proved "which was reasonably calculated to prejudice the public interest by unduly" restraining trade and which was intended "to injure the general public by" restraining trade. P. 708.

(b) The District Court misinterpreted the law in defining "monopolization" and "attempted monopolization" in terms of "conspiracy to monopolize," and this error was prejudicial rather than harmless. Pp. 708–709.

(c) The District Court erred in its persistent exclusion of evidence relating to the period before petitioners' entrance into the industry, since this evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry and that they were eliminated in furtherance thereof. Pp. 709–710.

289 F. 2d 86, judgment vacated and case remanded for new trial.

Joseph L. Alioto argued the cause for petitioners. With him on the briefs were *Maxwell Keith* and *Richard Saveri.*

Josiah G. Holland argued the cause for the Vanadium Corporation of America, respondent. With him on the briefs were *Edward R. Neaher, Robert P. Davison, Melvin D. Goodman* and *Francis N. Marshall.*

Richard J. Archer argued the cause for Union Carbide & Carbon Corp. et al., respondents. With him on the briefs were *Herbert W. Clark* and *Girvan Peck.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This is a private treble damage action under the antitrust laws.[1] Continental Ore Company, a partnership,

[1] The action was brought under § 4 of the Clayton Act, 15 U. S. C. § 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

and its individual partners, who were plaintiffs in the trial court, are petitioners here.[2] Henry J. Leir, the principal party in Continental, had engaged in the buying and selling of metals, including vanadium products, in Europe prior to 1938, in which year he immigrated to the United States. This case concerns his subsequent efforts in this country to build a successful business in the production and sale of vanadium.

Vanadium is a metal obtained from certain ores which, in this country, are mined principally on the Colorado plateau. The ore is processed at mills near the mines into a substance commonly known as vanadium oxide. The oxide is then transported to the East and converted into ferrovanadium,[3] which is purchased chiefly by steel companies for use as an alloy in hardening steels.

The defendants named in the complaint were Vanadium Corporation of America (VCA), a fully integrated miner and manufacturer of vanadium products, Union Carbide and Carbon Corporation (Carbide), and the following four wholly owned subsidiary corporations of the latter company: United States Vanadium Corporation (USV), engaged in mining vanadium ore and processing vanadium oxide; Electro Metallurgical Company (Electro Met), engaged in making ferrovanadium; Electro Metallurgical Sales Corporation (Electro Met Sales), engaged in the sale of vanadium oxide and ferrovanadium; and Electro Metallurgical Company of Canada, Ltd. (Electro Met of Canada), engaged in selling vanadium products in Canada. The complaint was filed on November 15,

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[2] The partnership is the successor in interest to Continental Ore Corporation, organized in 1938 but later dissolved.

[3] During the years in question here the conversion was accomplished by respondents in electric furnaces. Continental sought to introduce the making of ferrovanadium by the aluminothermic process, which it claimed was more efficient and economical than respondents' method.

1949, and service was had on VCA, Carbide and USV. There was no service on Electro Met, Electro Met Sales or Electro Met of Canada. Carbide acquired the assets of Electro Met and Electro Met Sales by dissolution or merger during the year 1949, prior to the filing of the complaint herein.

The complaint alleged that, beginning in about 1933, the defendants and others acting in concert with them violated §§ 1 and 2 of the Sherman Act [4] by conspiring to restrain, by monopolizing, and by attempting and conspiring to monopolize, trade and commerce in ferrovanadium and vanadium oxide. The defendants were charged with purchasing and acquiring control over substantially all accessible vanadium-bearing ore deposits in the United States and substantially all vanadium oxide produced by others in the United States, with refusing to sell vanadium oxide to other potential producers of ferrovanadium, including Continental and its associates, with apportioning and dividing sales of ferrovanadium and vanadium oxide among themselves in certain proportions, with fixing identical prices for the sale of ferrovanadium and vanadium oxide and for the purchase of ore, and with making certain mutual arrangements whereby one or more Carbide subsidiaries supplied VCA with substantial quantities of vanadium oxide at preferential prices to VCA. The complaint stated that between 1933 and 1949 the defendants produced over

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[4] The Sherman Act, §§ 1–2, 15 U. S. C. §§ 1–2, provide in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . .

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

99% of all ferrovanadium and over 90% of all vanadium oxide produced in the United States and that during the same period the defendants sold over 99% of the ferrovanadium and vanadium oxide sold in this country.[5]

According to the complaint, as a proximate consequence of defendants' monopolistic and restrictive practices, independent producers and distributors of ferrovanadium and vanadium oxide, including Continental, were eliminated from the business. Specifically, the complaint detailed several efforts which Continental made to enter and maintain itself in the vanadium business, all of which were allegedly frustrated by defendants' Sherman Act violations: (1) In 1938, Continental negotiated a contract with Apex Smelting Company of Chicago whereby Apex was to build and operate a plant for the conversion of oxide to ferrovanadium by use of the aluminothermic process. Continental and Apex were to share the profits of this venture. On its part, Continental agreed to obtain raw materials for Apex and to sell the finished product. Operations under this contract began in the spring of 1940, but Apex terminated the agreement in 1942 allegedly because the illegal activities of defendants prevented the obtaining of a sufficient supply of vanadium oxide. (2) Meanwhile, Continental itself had begun to produce a compound called "Van-Ex," composed of vanadium oxide and other materials, which was designed for direct introduction into the steel-making process without prior conversion to ferrovanadium. This venture was allegedly

[5] The complaint alleged that VCA sold approximately two-thirds of all ferrovanadium and vanadium oxide sold by defendants (which was said to amount to approximately 99% of all ferrovanadium and vanadium oxide sold and consumed in the United States), while Electro Met Sales (a Carbide subsidiary) sold approximately one-third. According to petitioners' evidence, the Carbide group produced approximately 77% of domestic vanadium oxide, while VCA produced about 65% of ferrovanadium.

terminated in 1944 because of the difficulty of securing raw materials caused by defendants' unlawful practices, including the efforts of defendants to obtain ownership or control of the mines and mills of Continental's suppliers. (3) Continental had developed a business with a Canadian customer during 1942. When Electro Met Sales of Canada was appointed by the Canadian Government as the exclusive wartime agent to purchase and allocate vanadium for Canadian industries, that company, it is alleged, acting under the control and direction of its parent, Carbide, eliminated Continental entirely from the Canadian market and divided Continental's business solely between defendants. (4) Defendants in 1943, by open threats of reprisals, allegedly frustrated certain arrangements which Continental had with the Climax Molybdenum Corporation for the manufacture of ferrovanadium. (5) In January 1944, Continental contracted with Imperial Paper & Color Corporation for the processing by the latter of vanadium oxide and ferrovanadium. Continental agreed to act as sales agent for the output. The complaint charged that Imperial abandoned the contract at the end of 1944 because of the inability to secure raw materials and that Continental then left the vanadium business altogether, all as a result of the restrictive and monopolistic practices of the defendants.

Trial was to a jury and a verdict was returned for defendants. Continental appealed, asserting error in the trial court's exclusion of various evidentiary items, in certain of the instructions given to the jury, in the refusal to give other instructions, and in other rulings of the trial court. The Court of Appeals for the Ninth Circuit announced that its task was to review the correctness of the judgment below, not the reasons therefor, and on that basis affirmed the judgment, 289 F. 2d 86, holding that there was insufficient evidence to justify a jury find-

ing that defendants' illegal acts were in fact the cause of Continental's failure in the vanadium business, and hence, that a verdict for defendants should have been directed. In reaching its decision, the court stated that it had considered not only all the evidence admitted by the trial judge, but also all the evidence offered by the plaintiffs which the trial judge excluded. The court did not deal with or rule upon any of the alleged trial errors relied upon by Continental, except for the issue relating to Continental's alleged exclusion from the Canadian market. Certiorari was granted, limited to issues which required examination in the light of previous decisions of this Court and which presented important questions under the antitrust laws. 368 U. S. 886. We have concluded, for the reasons discussed hereafter, that the Court of Appeals' decision must be reversed and the case remanded for a new trial.

I.

The Court of Appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.[6] From our examination of the

[6] As Professor Moore has indicated, "In ruling on the motion [for directed verdict] the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." 5 Moore's Federal Practice 2316 (2d ed., 1951). See *Pawling* v. *United States*, 4 Cranch 219; *Gunning* v. *Cooley*, 281 U. S. 90; *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29. Cf. *Smith* v. *Reinauer Oil Transport*, 256 F. 2d 646, 649 (C. A. 1st Cir.).

The same rule governs in ruling upon motions for directed verdict in treble damage suits under the antitrust laws. *Schad* v. *Twentieth Century-Fox Film Corp.*, 136 F. 2d 991, 993 (C. A. 3d Cir.); *Wis-*

rather extensive record, we have concluded that the Court of Appeals departed from this rule and erred in holding that there was insufficient evidence to support a finding that respondents' conduct in fact caused injury to Continental's business.

Continental's fundamental claim throughout was that inadequate supplies of vanadium oxide were available to it and its associates, and that respondents' alleged Sherman Act violations caused or contributed to this shortage. The Court of Appeals acknowledged the principle in antitrust cases that "where the plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss, there are cases which say that the jury, as the trier of the facts, must be permitted to draw from this circumstantial evidence the inference that the necessary causal relation exists." [7] The court also assumed that the evidence was

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consin Liquor Co. v. *Park & Tilford Distillers Corp.*, 267 F. 2d 928, 930 (C. A. 7th Cir.). Cf. *United States* v. *Diebold, Inc.*, 369 U. S. 654, 655; *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473.

[7] 289 F. 2d, at 90. For this statement, the Court of Appeals relied upon *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251; *Eastman Kodak Co. of New York* v. *Southern Photo Materials Co.*, 273 U. S. 359; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555; *Martin* v. *Herzog*, 228 N. Y. 164, 170–171, 126 N. E. 814, 816. Thus in *Bigelow* this Court stated: "[I]n the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." 327 U. S., at 264. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Id.*, at 265. See *Bordonaro Bros. Theatres* v. *Paramount Pictures*, 176 F. 2d 594, 597 (C. A. 2d Cir.); *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 957–959 (C. A. 10th Cir.).

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adequate to support a jury finding that respondents committed the alleged violations of the Sherman Act and that the specific acts charged to have been done by respondents were performed as part of the basic plan to monopolize the vanadium market. Nor did the court take express issue with the averments that adequate supplies of vanadium oxide were unavailable to Continental during certain periods or with the argument that a shortage of vanadium oxide was the type of consequence that would reasonably be expected to flow from a conspiratorial and monopolistic arrangement controlling 99% of the ferrovanadium and vanadium oxide sold in this country. The court nevertheless concluded, in effect, that before there could be a sufficient showing of any shortage of vanadium oxide, or at least before the jury could be permitted to infer that any such lack of material was chargeable to respondents, Continental was required to demonstrate both that it made timely demands for oxide from respondents and that it exhausted all other possible sources of that material.

The court then examined *seriatim* the Apex, Van-Ex, Climax, Canadian and Imperial ventures and ruled separately upon the respondents' alleged damage to Continental in connection with each of these episodes. As to Apex and Imperial, it was said that Continental's demands for oxide from respondents were not sufficiently contemporaneous with the failure of these ventures to subject respondents to liability. As to the Van-Ex period, respondents were blameless not because oxide had not been requested from them but because Continental failed, in the court's view, to exhaust at least one other available source. The Canadian and Climax issues were disposed of on different grounds.

It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We

think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 226 U. S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co.* v. *United States,* 147 F. 2d 93, 106 (C. A. 6th Cir.). See *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45–46.

Furthermore, we do not believe that respondents' liability under the antitrust laws can be measured by any rigid or mechanical formula requiring Continental both to demand materials from respondents and to exhaust all other sources of supply. The Court of Appeals appears to have accorded no weight to Continental's evidence which was offered to show that respondents had interfered with, acquired, or destroyed the several small independent sources of vanadium oxide relied upon by Continental. Under the criteria used by the Court of Appeals, respondents could, with impunity, concertedly refuse to deal with Continental while the latter was able to obtain some oxide from independent sources, then proceed at their leisure to dry up those other sources, and finally insist that Continental make repeated demands for respondents' oxide before incurring antitrust liability. The cases relied upon by the Court of Appeals [8] clearly do not support any such formula and we cannot deem the injury

[8] *Royster Drive-In Theatres, Inc.,* v. *American Broadcasting-Paramount Theatres, Inc.,* 268 F. 2d 246, 251; *Standard Oil Co. of California* v. *Moore,* 251 F. 2d 188, 198; *Congress Bldg. Corp.* v. *Loew's, Inc.,* 246 F. 2d 587, 596–598; *Milwaukee Towne Corp.* v. *Loew's, Inc.,* 190 F. 2d 561, 568.

alleged to flow from a monopolist's elimination of one's independent suppliers to be so "remote" as to justify refusing to let the damages issue go to the jury.[9]

Our review of the record discloses sufficient evidence for a jury to infer the necessary causal connection between respondents' antitrust violations and petitioners' injury. In concluding that Continental and Apex had not made sufficient efforts to obtain vanadium oxide from respondents, the Court of Appeals either overlooked or interpreted into insignificance the repeated approaches made to respondents by Continental and Apex in July and October of 1939, in March and October of 1940 and in June and July of 1941. The court also failed to notice certain communications from Apex in September and December 1941, saying that it could operate at only partial capacity due to the lack of raw materials. Nor did the court mention the testimony of an officer of Apex to the effect that Apex's supply of oxide was irregular and intermittent and that the unavailability of oxide was one of the reasons that Apex did not operate at full capacity. According to the Court of Appeals, the "critical period" during which Continental and Apex should have demanded materials from the respondents was the year preceding the termination of the Apex contract, which the court placed in June 1942. But it is quite plain from the record that Apex notified Continental of its determination to terminate the contract in January and February of 1942, which followed much more closely the previous refusals of respondents to deal with Continental and Apex.

Undoubtedly, all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury and it is the jury

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[9] Cf. *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207.

which "weighs the contradictory evidence and inferences" and draws "the ultimate conclusion as to the facts." *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35.

During the so-called Van-Ex period, the court did not exculpate respondents because of petitioners' failure to request oxide from them but because petitioners supposedly failed to take advantage of an independent source of supplies. But the evidence relied upon by the court can just as reasonably be read in a manner favorable to Continental and it appears that the court may have misapprehended significant parts of this record.[10] In any event, the interpretation and significance of this evidence were for the jury.

The Court of Appeals also concluded that the respondents did not contribute to the failure of Imperial to produce ferrovanadium under its contract with Continental. The court acknowledged, and there appears to be substantial evidence to this effect, that Imperial's decision was based upon its concern about a steady and reliable

[10] The Court of Appeals' interpretation of the evidence was that in 1943 Continental declined to deal with Nisley & Wilson, an independent producer of vanadium oxide, particularly in October 1943, when Continental supposedly failed to make any effort to procure Nisley & Wilson's flaked vanadium oxide and in January 1944 when, according to the court, Continental refused to buy some 300,000 pounds of "oxide" offered by Nisley & Wilson at the time the latter went out of business. But in October 1943, Nisley & Wilson was entirely engaged in processing ore furnished by the Government and its vanadium oxide product was obtainable only through allocation by the War Production Board. The correspondence between Nisley & Wilson and Continental was looking toward a postwar relationship, and Continental's letter might well be interpreted by a jury not as a refusal to buy but as a statement of intention by Continental to cooperate with Nisley & Wilson to keep the latter's mill running during peacetime. As for the 300,000 pounds of "oxide" which the court said was offered to Continental, the material actually was ore, not oxide. Furthermore, Nisley & Wilson did not own the ore and failed in its effort to buy it from the Government.

source of raw materials. Continental had requested VCA and USV to provide sizable monthly supplies of oxide in November of 1943, but the Court of Appeals bracketed this evidence with the Van-Ex period even though the testimony clearly was that the supplies then sought were for the Imperial arrangement which was then being negotiated. Imperial, after signing the contract, carefully surveyed foreign sources of vanadium, concluded they were inadequate and determined not to go into production because a reliable, long-range source of oxide was not available. In spite of the refusal of respondents to deal with Continental in November 1943 and in previous months and years, and in spite of the assumed monopolistic control of almost all of the vanadium oxide in the United States, the court ruled that Continental must have requested oxide from respondents after the contract with Imperial was signed in January of 1944. We think the jury should be allowed to determine whether respondents' conduct materially contributed to the failure of the Imperial venture, to Continental's damage.

II.

Continental's alleged elimination from the Canadian market raises different issues. At the trial Continental introduced evidence to show that beginning in March 1942, it had shipped Van-Ex to a Canadian customer each month during the remainder of that year. There was then received in evidence a letter dated January 19, 1943, from Continental to Electro Met in New York City reciting that the new allocation system in Canada [11] had elimi-

[11] Canada's entry into World War II prompted the Canadian Government to take extraordinary measures to assure optimum availability of strategic materials to Canadian private industries engaged in the war effort. Pursuant to these measures, the Office of Metals Controller was established and given broad powers to regulate the

nated Continental from the Canadian market in January, that Continental had inquired about the matter from the Metals Controller for the Canadian Government and that the latter had referred Continental to Electro Met. The court then struck this letter from the record and rejected petitioners' offer to prove that Continental was excluded from the Canadian market by Electro Met of Canada, a wholly owned subsidiary corporation of Carbide, acting as exclusive purchasing agent for the Metals Controller but allegedly operating in this connection under the control and direction of Carbide for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry. To that end, Continental offered to prove that its former share of the Canadian market was divided between Carbide and VCA. Continental offered various correspondence with Electro Met of Canada and a memorandum and proposed testimony by Continental's vice president concerning his conversations with an employee of Electro Met who had communicated with Continental in response to Continental's letter of January 19, 1943, to Electro Met. The court denied the entire offer of proof "for the reason that this is a transaction wholly in the hands of the Canadian Government and that whether or not this plaintiff was permitted to sell his material to a customer in Canada was a matter wholly within the control of the Canadian Government."

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procurement of the materials and to allocate them to industrial users. See Order of the Governor General in Council, P. C. 3187, July 15, 1940. The Metals Controller enlisted the aid of Electro Met of Canada in early 1943, delegating to it the discretionary agency power to purchase and allocate to Canadian industries all vanadium products required by them. The validity of these wartime measures and delegations under Canadian law is not here contested. Cf. *Reference Re Regulations (Chemicals) Under War Measures Act*, 1 D. L. R. [1943] 248.

The Court of Appeals agreed with the trial court and concluded that Continental was not legally entitled to recover from respondents for the destruction of its Canadian business. The court said that no vanadium oxide could be imported into Canada by anyone other than the Canadian Government's agent, Electro Met of Canada, which refused to purchase from the petitioners. Thus, according to the court, "even if we assume that Electro Metallurgical Company of Canada, Ltd., acted for the purpose of entrenching the monopoly position of the defendants in the United States, it was acting as an arm of the Canadian Government, and we do not see how such efforts as appellants claim defendants took to persuade and influence the Canadian Government through its agent are within the purview of the Sherman Act." 289 F. 2d, at 94. This ruling was erroneous and we hold that Continental's offer of proof was relevant evidence of a violation of the Sherman Act as charged in the complaint and was not inadmissible on the grounds stated by the courts below.

Respondents say that *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, shields them from liability. This Court there held that an antitrust plaintiff could not collect damages from a defendant who had allegedly influenced a foreign government to seize plaintiff's properties. But in the light of later cases in this Court respondents' reliance upon *American Banana* is misplaced. A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries. *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Pacific & Arctic R. & Navigation Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corp.*, 274 U. S. 268. Cf. *Steele* v. *Bulova Watch Co.*, 344 U. S. 280; *Branch* v. *Federal Trade Comm'n*, 141 F.

2d 31 (C. A. 7th Cir.). See *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (C. A. 2d Cir.); *United States* v. *National Lead Co.,* 63 F. Supp. 513 (D. C. S. D. N. Y.), aff'd, 332 U. S. 319.[12]

Furthermore, in the *Sisal* case, *supra,* a combination entered into within the United States to monopolize an article of commerce produced abroad was held to violate the Sherman Act even though the defendants' control of that production was aided by discriminatory legislation of the foreign country which established an official agency as the sole buyer of the product from the producers and even though one of the defendants became the exclusive selling agent of that governmental authority. Since the activities of the defendants had an impact within the United States and upon its foreign trade, *American Banana* was expressly held not to be controlling.[13]

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[12] See also Brewster, Antitrust and American Business Abroad 65–75 (1958); Fugate, Foreign Commerce and the Antitrust Laws 20–55 (1958); Atty. Gen. Nat. Comm. Antitrust Rep. 66–77 (1955); Kramer, Application of the Sherman Act to Foreign Commerce, 3 Antitrust Bull. 387 (1958); Carlston, Antitrust Policy Abroad, 49 N. W. U. L. Rev. 569 (1954).

[13] "The circumstances of the present controversy are radically different from those presented in *American Banana Co.* v. *United Fruit Co., supra,* and the doctrine there approved is not controlling here. . . .

"Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sales of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws." 274 U. S., at 275–276.

Olsen v. *Smith*, 195 U. S. 332; *United States* v. *Rock Royal Co-op*, 307 U. S. 533; and *Parker* v. *Brown*, 317 U. S. 341, do not help respondents. These decisions, each of which sustained the validity of mandatory state or federal governmental regulations against a claim of antitrust illegality, are wide of the mark. In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller. Nor is there left in the case any question of the liability of the Canadian Government's agent, for Electro Met of Canada was not served. What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.

From the evidence which petitioners offered it appears that Continental complained to the Canadian Metals Controller that Continental had lost its Canadian business. The Controller referred Continental to one of the respondents. But there is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped. The exclusion, Continental claims, resulted from the action of Electro Met of Canada, taken within the area of its discretionary powers granted by the Metals Controller and in concert with or under the direction of the respondents. The offer of proof at least presented an issue for the jury's resolution as to whether the loss of Continental's Canadian business was occasioned by respondents' activities. Respondents are afforded no

defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in any way compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme. *Swift & Co.* v. *United States,* 196 U. S. 375, 396; *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809; *Steele* v. *Bulova Watch Co.,* 344 U. S. 280, 287. See *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 457–458; *Slick Airways* v. *American Airlines,* 107 F. Supp. 199, 207 (D. C. N. J.).

The case of *Eastern Railroad Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127, cited by the court below and much relied upon by respondents here, is plainly inapposite. The Court there held not cognizable under the Sherman Act a complaint charging, in essence, that the defendants had engaged in a concerted publicity campaign to foster the adoption of laws and law enforcement practices inimical to plaintiffs' business. Finding no basis for imputing to the Sherman Act a purpose to regulate political activity, a purpose which would have encountered serious constitutional barriers, the Court ruled the defendants' activities to be outside the ban of the Act "at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U. S., at 138. In this case, respondents' conduct is wholly dissimilar to that of the defendants in *Noerr.* Respondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws. To subject them to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power

conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*.

III.

Since our decision concerning the alleged loss of Continental's Canadian business will in any event require a new trial of the entire case in view of the close interconnection between the Canadian and domestic issues, we shall remand the case to the District Court for further proceedings. We therefore deem it appropriate to pass upon certain of the alleged trial errors raised by Continental in the Court of Appeals but not considered by that court. In passing upon these issues, we are not to be understood as expressing any views on the merits of those matters raised by Continental before the Court of Appeals but not discussed here.

An error committed by the trial court, perhaps understandable because the trial preceded this Court's decision in *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, was the "public injury" charge. Although petitioners pleaded a concerted refusal to deal with them by respondents, a price-fixing conspiracy, and an allocation of customers, all *per se* violations under § 1 of the Sherman Act, the court charged the jury that a conspiracy must be proved "which was reasonably calculated to prejudice the public interest by unduly" restraining trade, and which was intended "to injure the general public by" restraining trade. Under the rule stated in *Klor's*, this charge was error.

The trial court also erred in its treatment of monopolization. Initially, in its charge to the jury, the court defined "monopolize" as referring to "the joint acquisition or maintenance by the members of the conspiracy formed for that purpose, of the power to control and dominate

interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power." The court also related its definition of "attempt to monopolize" to action taken by a combination or conspiracy. The jury was further instructed that "an essential element of the illegal monopoly or monopolization is the existence of a combination or conspiracy to acquire and maintain the power" and that a verdict must be returned for the defendants "if you find that the plaintiffs have not proved that there was . . . a conspiracy." Petitioners duly excepted to the charge on the ground that they were entitled to prevail if they could prove that either respondent monopolized unilaterally.

Petitioners' complaint did not preclude reliance on unilateral monopolization and the evidence offered was relevant and material to such a charge. The trial court's misinterpretation of the law in defining "monopolization" and "attempted monopolization" in terms of "conspiracy to monopolize" was therefore prejudicial rather than harmless. This error should not be repeated in a new trial.[14]

The trial court further erred in its persistent exclusion of evidence relating to the pre-1938 period, on the ground that since Mr. Leir came to this country in 1938 nothing which transpired earlier could be relevant to his suit. Petitioners sought to introduce evidence that the conspiracy and monopolization alleged began in the early 1930's, that overt acts in furtherance thereof

[14] Among the cases in which this Court has condemned unilateral monopolization are *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, 468; *Lorain Journal* v. *United States,* 342 U. S. 143, 154. See also *United States* v. *Aluminum Co.,* 148 F. 2d 416 (C. A. 2d Cir.); *United States* v. *United Shoe Mach. Co.,* 110 F. Supp. 295 (D. Mass.), aff'd, 347 U. S. 521.

occurred in the 1930's, and that it was pursuant to this anticompetitive scheme that respondents sought to and did eliminate petitioners from the vanadium industry after 1938. This evidence was clearly material to petitioners' charge that there was a conspiracy and monopolization in existence when they came into the industry, and that they were eliminated in furtherance thereof.[15] We do not mean that a trial court may not place reasonable limits upon such evidence or set a reasonable cut-off date, evidence before which point is to be considered too remote to have sufficient probative value to justify burdening the record with it.[16] But that was not the basis for this exclusionary ruling.

We conclude that the judgment of the Court of Appeals must be vacated and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

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[15] Thus in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 75–76, this Court considered evidence as to defendants' acts in 1879–1882, prior to the Sherman Act's passage in 1890, in order to ascertain the monopolistic intent or purpose of the founders of the Standard Oil Trust. And in *Kansas City Star Co.* v. *United States*, 240 F. 2d 643, 650–651 (C. A. 8th Cir.), evidence from the period preceding the criminal statute of limitations was allowed into consideration to show that defendants' course of conduct over a period of years indicated that they retained an unlawful intent during the immediate pre-indictment period.

[16] See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 228–231.

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION No. 795 ET AL. *v.* YELLOW TRANSIT FREIGHT LINES, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 13. Argued October 11, 1961.—Decided June 25, 1962.

Judgment reversed on the authority of *Sinclair Rfg. Co.* v. *Atkinson, ante,* p. 195.

Reported below: 282 F. 2d 345.

David Previant argued the cause and filed briefs for petitioners.

Malcolm Miller argued the cause for respondents. With him on the briefs were *Charles Blackmar, Carl T. Smith* and *John F. Eberhardt.*

J. Albert Woll, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

PER CURIAM.

Reversed. *Sinclair Rfg. Co.* v. *Atkinson, ante,* p. 195.

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN join, concurring.

Since it is clear that the collective bargaining agreement involved in this case does not bind either party to

arbitrate any dispute, I agree that no injunction should be granted.* See *Sinclair Rfg. Co.* v. *Atkinson, ante,* p. 215 (dissenting opinion).

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*The grievance machinery emphasizes voluntary settlements through negotiations between employer and union representatives. Settlement is first to be attempted between the employer and the local union involved and, failing adjustment, negotiated settlement is to be attempted by a joint state committee consisting of equal numbers of employer and union representatives. If a majority of that committee "settles a dispute," "[s]uch a decision will be final and binding on both parties." If a joint state committee fails to settle a dispute, a negotiated settlement is then to be attempted by a joint area committee consisting of equal numbers of employer and union representatives duly elected by the various joint state committees. This is the last stage unless there is agreement at that point to submit unsettled disputes to arbitration. Obviously, either employer or union representatives are free to prevent arbitration. For the contract provisions are:

"(d) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Committee determines to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

. . . . . .

"(f) In the event of strikes, work-stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement."

IDLEWILD BON VOYAGE LIQUOR CORP. *v.* EPSTEIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 138. Argued February 28, 1962.—Decided June 25, 1962.*

Having been informed by officials of the State of New York that its business of selling bottled wines and liquors for export from the United States and delivery to international airline passengers at their overseas destinations was illegal under a state statute, petitioner sued in a Federal District Court for a judgment declaring that the statute, as applied, was repugnant to the Commerce Clause, the Export-Import Clause, and the Supremacy Clause of the Federal Constitution and for an injunction against its enforcement. A request for a three-judge court under 28 U. S. C. §§ 2281, 2284 was denied, and the single District Judge to whom it was presented simply retained jurisdiction of the cause, in order to give the state courts an opportunity to pass upon the constitutional issues presented, although there was no relevant litigation then pending in the state courts. The Court of Appeals expressed the opinion that a three-judge court should have been convened but that it was powerless to direct such action. Thereafter petitioner moved again for a three-judge court; but the motion was again denied. *Held:* A three-judge court should have been convened, and the case is remanded to the District Court for expeditious action in accordance with this view. Pp. 714–716.

Reported below: 289 F. 2d 426.

Charles H. Tuttle argued the cause for petitioner. With him on the briefs was *John F. Kelly.*

Julius L. Sackman argued the cause for respondents. With him on the briefs were *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General.

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*Together with No. 180, Misc., *Idlewild Bon Voyage Liquor Corp.* v. *Bicks et al., U. S. District Judges,* on petition for writ of mandamus.

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PER CURIAM.

The petitioner is in the business of selling bottled wines and liquors for export from the United States and delivery to international airline passengers at their overseas destinations. Upon advice of the Attorney General of New York, the State Liquor Authority informed the petitioner that its business was illegal under the provisions of the New York Alcoholic Beverage Control Law. The petitioner then instituted an action in the United States District Court for the Southern District of New York against the respondents, members of the State Liquor Authority. The complaint asked for a judgment declaring that the state statutes, as applied, were repugnant to the Commerce Clause, the Export-Import Clause, and the Supremacy Clause of the United States Constitution, and for an injunction restraining the State Liquor Authority from interfering with the petitioner's business.

A request for a three-judge court under 28 U. S. C. §§ 2281, 2284, was denied. Instead, the district judge to whom the request was presented simply retained jurisdiction of the cause, in order to give the state courts an opportunity to pass upon the constitutional issues presented, although there was no relevant litigation then pending in the state courts. 188 F. Supp. 434.

The petitioner appealed to the Court of Appeals for the Second Circuit.[1] That court dismissed the appeal, one judge dissenting. 289 F. 2d 426. Unambiguously stating its opinion that the District Court had acted erroneously, and that "a three-judge district court should have been convened," the Court of Appeals was never-

[1] During the pendency of the appeal another judge of the District Court for the Southern District of New York issued a temporary injunction restraining the respondents from harassing the petitioner's business, but, relying on the original judge's order, refused a renewed request for a three-judge court.

theless of the view that it was powerless to take formal corrective action in light of this Court's decision in *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10.[2]

Thereafter the petitioner once again filed a motion in the District Court requesting that a statutory three-judge court be impaneled. The request was again refused upon the ground that the previous ruling made by other judges of the District Court had established "the law of this case," and that the Court of Appeals' opinion that a three-judge court should be appointed was merely a "dictum." 194 F. Supp. 3. We granted certiorari and a motion for leave to file a petition for a writ of mandamus. 368 U. S. 812.

We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief.[3]

In the *Stratton* case it was held that a court of appeals was precluded from reviewing on the merits a case which

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[2] The Court of Appeals properly rejected the argument that the order of the District Court "was not final and hence unappealable under 28 U. S. C. §§ 1291, 1292," pointing out that "[a]ppellant was effectively out of court." 289 F. 2d, at 428.

[3] This is not a case like *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317, where a three-judge court was requested only in the event that it should first be held that the state statute was by its terms applicable to the plaintiff's business operations.

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should have originally been determined by a court of three judges. *Stratton* does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled.

We deem it unnecessary to take formal action on the petition for a writ of mandamus. The case will be remanded to the District Court for expeditious action consistent with the views here expressed. Cf. *Bailey* v. *Patterson*, 369 U. S. 31, 34.

It is so ordered.

MR. JUSTICE FRANKFURTER took no part in the decision of these cases.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

SILBER *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 454. Argued April 19, 1962.—Decided June 25, 1962.

Petitioner's indictment for violating 2 U. S. C. § 192 was identical to those held defective in *Russell* v. *United States*, 369 U. S. 749; the District Court erroneously denied a timely motion to dismiss it; and petitioner was convicted. The issue raised by the motion to dismiss apparently was not presented to the Court of Appeals, and it was not briefed or argued in this Court. *Held:* This Court, at its option, may notice a plain error not presented, and the judgment sustaining the conviction is reversed on the authority of *Russell* v. *United States*. Pp. 717–718.

111 U. S. App. D. C. 331, 296 F. 2d 588, reversed.

Victor Rabinowitz argued the cause for petitioner. With him on the briefs was *Leonard B. Boudin*.

Bruce J. Terris argued the cause for the United States. On the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Kevin T. Maroney*.

PER CURIAM.

The judgment is reversed. *Russell* v. *United States*, 369 U. S. 749. The indictment upon which the petitioner was tried was identical to those held defective in *Russell*. The petitioner's timely motion to dismiss the indictment, made in accord with Fed. Rules Crim. Proc. 12 (b)(2), was erroneously denied by the District Court.

Although the trial court squarely considered and decided the issue raised by the motion to dismiss, it was apparently not presented to the Court of Appeals and was not briefed or argued in this Court. While ordinarily we do not take note of errors not called to the attention of the Court of Appeals nor properly raised here, that rule

is not without exception. The Court has "the power to notice a 'plain error' though it is not assigned or specified," *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 412.* "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160. Our own rules provide that "the court, at its option, may notice a plain error not presented." Revised Rules of the Supreme Court of the United States, Rule 40 (1)(d)(2). See also Fed. Rules Crim. Proc. 52 (b).

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Russell* v. *United States,* 369 U. S. 749, 779, 781.

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*See *Brasfield* v. *United States,* 272 U. S. 448, 450; *Mahler* v. *Eby,* 264 U. S. 32, 45; *Weems* v. *United States,* 217 U. S. 349, 362. See also *Kessler* v. *Strecker,* 307 U. S. 22, 34.

UNITED STATES *v.* KNISS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 762. Decided June 25, 1962.

Reversed.

Solicitor General Cox, Assistant Attorney General Loevinger and *Richard A. Solomon* for the United States.

PER CURIAM.

The judgment is reversed. *United States* v. *Wise*, *ante*, p. 405.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

UNITED STATES *v.* STALEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 882. Decided June 25, 1962.

Reversed.

Solicitor General Cox and *Assistant Attorney General Loevinger* for the United States.

Homer I. Mitchell, Warren M. Christopher and *Aloysius F. Power* for appellees.

PER CURIAM.

The judgment is reversed. *United States* v. *Wise*, *ante*, p. 405.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

CITY CENTER MOTEL, INC., *v.* FLORIDA HOTEL AND RESTAURANT COMMISSION.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST APPELLATE DISTRICT.

No. 920. Decided June 25, 1962.

Appeal dismissed for want of a substantial federal question.
Reported below: 134 So. 2d 856.

John H. Cotten for appellant.

Weldon G. Starry for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

WASILEWSKI *v.* BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 1124, Misc. Decided June 25, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

WINTERS *v.* OHIO.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 388, Misc. Decided June 25, 1962.

Certiorari granted; judgment vacated; case remanded for further proceedings.

Petitioner *pro se*.

Richard O. Harris for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further proceedings. *Griffin* v. *Illinois*, 351 U. S. 12.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

OLEN *v.* OLEN.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1153, Misc. Decided June 25, 1962.

Appeal dismissed and certiorari denied.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

ELCHUK *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 965, Misc. Decided June 25, 1962.

Certiorari granted; judgment vacated; case remanded for further proceedings.

Reported below: 296 F. 2d 723.

Petitioner *pro se*.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. Upon the suggestion of the Solicitor General and an examination of the entire record, the judgment of the United States Court of Appeals for the Fifth Circuit is vacated and the case is remanded to that court for further proceedings in which the petitioner is to be accorded the opportunity to present oral argument on the merits of his appeal, either personally or through counsel, to the same extent as such opportunity is accorded to the United States Attorney.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MARAKAR *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 1191, Misc. Decided June 25, 1962.*

Certiorari granted; judgments vacated; causes remanded with directions to dismiss the indictments.

Reported below: 300 F. 2d 513.

Joseph F. Walsh for petitioner in No. 1191, Misc.

Harry T. Carter for petitioner in No. 1234, Misc.

Solicitor General Cox for the United States.

PER CURIAM.

The motions for leave to proceed *in forma pauperis* are granted. On motion of the Solicitor General and upon an examination of the entire record, the petitions for writs of certiorari are granted, the judgments are vacated, and the causes are remanded to the United States District Court for the District of New Jersey with directions to dismiss the indictments.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN join the Court's disposition because they believe that the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to the prosecution of these petitioners under the separate indictments returned on April 26, 1961, charging each petitioner with a substantive offense of illegally bringing opium into this country. See *Abbate* v. *United States,* 359 U. S. 187, 196 (separate opinion); cf. *Petite* v. *United States,* 361 U. S. 529, 533 (dissenting opinion).

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these cases.

*Together with No. 1234, Misc., *Ali* v. *United States,* also on petition for writ of certiorari to the same Court.

HARTMAN *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 447, Misc. Decided June 25, 1962.

Certiorari granted; judgment reversed.
Reported below: 290 F. 2d 460.

Lawrence Speiser for petitioner.

Solicitor General Cox, Assistant Attorney General Yeagley and *George B. Searls* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis,* the motion for leave to supplement the petition for certiorari and the petition for writ of certiorari are granted. The judgment is reversed. *Russell* v. *United States,* 369 U. S. 749; *Silber* v. *United States, ante,* p. 717.

MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITE took no part in the consideration or decision of this case.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Russell* v. *United States,* 369 U. S. 749, 779, 781.

ALLEN *v.* BANNAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 535, Misc. Decided June 25, 1962.

Certiorari granted; judgment vacated; case remanded to the District Court for a hearing on the merits of petitioner's application for a writ of habeas corpus, since petitioner has exhausted state remedies.

Petitioner *pro se.*

Frank J. Kelley, Attorney General of Michigan, *Eugene Krasicky,* Solicitor General, and *George Mason,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment of the United States Court of Appeals for the Sixth Circuit is vacated and the case is remanded to the United States District Court for the Eastern District of Michigan for a hearing on the merits of the petitioner's application for a writ of habeas corpus. After an examination of the briefs filed by the parties and of the record in this case as well as an examination of the record certified to this Court by the Clerk of the Supreme Court of Michigan in *Allen* v. *Michigan,* 364 U. S. 934, we conclude that the petitioner has exhausted state remedies. Cf. *Mattox* v. *Sacks,* 369 U. S. 656.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

LOUISIANA EX REL. WASHINGTON *v.* WALKER, WARDEN.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 900, Misc. Decided June 25, 1962.

Appeal dismissed for want of a substantial federal question.

Robert H. Reiter and *Jack N. Rogers* for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, and *Scallan E. Walsh,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

GILLIAM *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 1274, Misc. Decided June 25, 1962.

Certiorari granted; judgment vacated; case remanded to the Court of Appeals for further proceedings.

Petitioner *pro se*.

Solicitor General Cox for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. Upon the suggestion of the Solicitor General and an examination of the entire record, the judgment is vacated and the case is remanded to the Court of Appeals for further proceedings. *Coppedge* v. *United States*, 369 U. S. 438.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

WHITUS *v.* BALKCOM, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 1357, Misc. Decided June 25, 1962.

Certiorari granted; judgment vacated; case remanded to the District Court for a hearing on the merits of the petition for writ of habeas corpus.

Reported below: 299 F. 2d 844.

Petitioner *pro se.*

Eugene Cook, Attorney General of Georgia, and *Howard P. Wallace,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Southern District of Georgia for a hearing on the merits of the petition for writ of habeas corpus.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 728 and 901 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM MAY 28 THROUGH JUNE 25, 1962.

MAY 28, 1962.*

Miscellaneous Orders.

No. —. HOMESTEAD HOSPITAL *v.* BOBCIK. The motion of the appellee to dismiss under Rule 14 (2) is granted and the appeal is dismissed. *Edwin O. Simon* for appellee.

No. 823. PAN AMERICAN PETROLEUM CORP. *v.* KANSAS-NEBRASKA NATURAL GAS CO., INC. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The motion of Western Natural Gas Company for leave to file a brief, as *amicus curiae*, is granted. *George D. Horning, Jr.* for movant. Reported below: 297 F. 2d 561.

Probable Jurisdiction Noted.

No. 659. NORTHERN NATURAL GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS. Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Lawrence I. Shaw, F. Vinson Roach, Patrick J. McCarthy, Mark H. Adams* and *Joe Rolston* for appellant. *Jerome Ackerman* for appellee. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander, Sherman L. Cohn, Ralph S. Spritzer, Howard E. Wahrenbrock* and *Arthur H. Fribourg* for the Federal Power Commission, as *amicus curiae*. Reported below: 188 Kan. 351, 362 P. 2d 609; 188 Kan. 355, 362 P. 2d 599; 188 Kan. 624, 364 P. 2d 668.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

663026 O-62-51

No. 796. NEW YORK CENTRAL RAILROAD CO. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Kenneth H. Lundmark* for appellant. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, appellees. Reported below: 201 F. Supp. 958.

Certiorari Granted. (*See also No. 728, Misc., ante, p. 48.*)

No. 793. SCHLUDE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari granted. *Robert Ash* and *Carl F. Bauersfeld* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Burt J. Abrams* for respondent. *Fontaine C. Bradley, John T. Sapienza, Robert L. Randall* and *Alvin Friedman* for the American Institute of Certified Public Accountants, as *amicus curiae,* in support of the petition. Reported below: 296 F. 2d 721.

No. 1022, Misc. HAYNES *v.* WASHINGTON. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Washington granted. Case transferred to the appellate docket. *Francis Hoague* for petitioner. *John J. Lally* for respondent. Reported below: 58 Wash. 2d 716, 364 P. 2d 935.

Certiorari Denied. (*See also No. 789, ante, p. 46; and No. 824, ante, p. 47.*)

No. 864. CAIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 298 F. 2d 934.

No. 394. GEAGAN ET AL. *v.* GAVIN, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* and *Lawrence O'Donnell* for petitioners. *Edward J. McCormack,* Attorney General of Massachusetts, *John F. McAuliffe* and *Gerald F. Muldoon,* Special Assistant Attorneys General, for respondent. Reported below: 292 F. 2d 244.

No. 395. MCDONALD *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Frederick Bernays Wiener* for petitioner. Reported below: 231 Ore. —, 361 P. 2d 1001.

No. 710. MCDONALD *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Frederick Bernays Wiener* for petitioner. Reported below: 231 Ore. —, 365 P. 2d 494.

No. 856. WILLEMS INDUSTRIES, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Richard J. Stull* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: — Ct. Cl. —, 295 F. 2d 822.

No. 859. BOSTIC *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Abraham Gertner* for petitioner. Reported below: 173 Ohio St. 176, 180 N. E. 2d 582.

No. 867. CHAPPELLE *v.* SHARP ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Sommers T. Brown* and *Paul M. Rhodes* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 112 U. S. App. D. C. 182, 301 F. 2d 506.

No. 827. ALVAREZ *v.* PUERTO RICO. C. A. 1st Cir. Certiorari denied. *Melvin S. Louison* and *Leonard Louison* for petitioner. *J. B. Fernandez Badillo* for respondent. Reported below: 299 F. 2d 576.

No. 869. ASARO *v.* PARISI. C. A. 1st Cir. Certiorari denied. *Morris D. Katz* for petitioner. *James A. Whipple* for respondent. Reported below: 297 F. 2d 859.

No. 871. H. B. IVES CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Jules G. Korner III* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Fred E. Youngman* for respondent. Reported below: 297 F. 2d 229.

No. 873. SARELAS *v.* GEKAS ET AL. Supreme Court of Illinois. Certiorari denied. *Peter S. Sarelas pro se. John C. Gekas, James P. Economos, Catherine C. Anagnost* and *Gerald M. Chapman* for respondents.

No. 874. AUGUST *v.* BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA. Supreme Court of Pennsylvania. Certiorari denied. *William J. Woolston* for petitioner. *Edward B. Soken* for respondent. Reported below: 406 Pa. 229, 177 A. 2d 809.

No. 863. HALUN *v.* JONES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted, the judgment of the Court of Appeals reversed and the case remanded to the District Court for a jury trial. *Solomon Alpher* for petitioner. *William H. Clarke* for respondent. Reported below: 111 U. S. App. D. C. 340, 296 F. 2d 597.

No. 866. In re Clawans. Supreme Court of New Jersey. Certiorari denied. Mr. Justice Brennan took no part in the consideration or decision of this application. *Richard L. Merrick* and *Warren E. Magee* for petitioner. Reported below: See 69 N. J. Super. 373, 174 A. 2d 367.

No. 610, Misc. Johnson *v.* United States. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 782, Misc. Phinney *v.* Murphy, Warden. Appellate Division of the Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Joseph J. Rose*, Assistant Attorney General, for respondent.

No. 802, Misc. Burton *v.* Florida. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *David U. Tumin*, Assistant Attorney General, for respondent.

No. 828, Misc. Banks *v.* Madigan, Warden. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 818, Misc. Tyler *v.* California. District Court of Appeal of California, First Appellate District. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Arlo E. Smith*, Chief Assistant Attorney General, and *John S. McInerny* and *Derald E. Granberg*, Deputy Attorneys General, for respondent.

No. 832, Misc. OVERBY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Carman F. Ball* for respondent.

Rehearing Denied.

No. 22. SCHOLLE *v.* HARE, SECRETARY OF STATE OF MICHIGAN, ET AL., 369 U. S. 429;

No. 776. LONG *v.* ILLINOIS CENTRAL RAILROAD CO., 369 U. S. 858; and

No. 1044, Misc. HOLLIS *v.* TEXAS, 369 U. S. 862. Petitions for rehearing denied.

JUNE 4, 1962.*

Miscellaneous Orders.

No. —. IN RE SHIELDS. Henry R. Shields, Esquire, of New York, New York, having resigned as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice in this Court.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL. Argued January 8–11, 1962. This case is restored to the calendar for reargument and set for Monday, October 8, 1962. A total of six hours is allowed for the reargument. THE CHIEF JUSTICE took no part in the consideration or decision of this case. *Mark Wilmer* and *Charles H. Reed* argued the cause for the complainant. With them on the briefs were *William R. Meagher, Burr Sutter, John E. Madden, Calvin H. Udall, John Geoffrey Will* and *Theodore Kiendl*. *Fred O. Wilson* and *Martin J. Sonosky* also were for the complainant. *Stanley Mosk*, Attorney General of California, and *Northcutt Ely*, Special Assistant

*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

Attorney General, argued the cause for the State of California et al., defendants. With them on the briefs were *Charles E. Corker* and *Gilbert F. Nelson*, Assistant Attorneys General, *Burton J. Gindler, John R. Alexander* and *Gerald Malkan*, Deputy Attorneys General, *Howard I. Friedman, C. Emerson Duncan II, Francis E. Jenney, Stanley C. Lagerlof, Harry W. Horton, R. L. Knox, Jr., Earl Redwine, James H. Howard, Charles C. Cooper, Jr., H. Kenneth Hutchinson, Frank P. Doherty, Roger Arnebergh, Jean F. DuPaul* and *Henry A. Dietz*. *Solicitor General Cox* argued the cause for the United States, intervener. With him on the briefs were *John F. Davis, David R. Warner, Walter Kiechel, Jr.* and *Warren R. Wise*. *R. P. Parry* argued the cause for the State of Nevada, intervener. With him on the briefs were *Roger D. Foley*, Attorney General, *W. T. Mathews* and *Clifford E. Fix*. *Dennis McCarthy*, Special Assistant Attorney General, argued the cause for the State of Utah, defendant. With him on a statement on behalf of the State was *Walter L. Budge*, Attorney General. *Earl E. Hartley*, Attorney General of New Mexico, and *Claude S. Mann*, Special Assistant Attorney General, argued the cause for the State of New Mexico, defendant. With them on the brief were *Thomas O. Olson*, First Assistant Attorney General, and *Dudley Cornell*, Special Assistant Attorney General. [For earlier orders herein, see 344 U. S. 806, 919; 345 U. S. 914, 968; 347 U. S. 985, 986; 348 U. S. 947; 350 U. S. 114, 812, 880, 955; 351 U. S. 977; 354 U. S. 918; 357 U. S. 902; 364 U. S. 940; 368 U. S. 893, 917, 950.]

No. 809. FAY, WARDEN, ET AL. *v.* NOIA. Certiorari, 369 U. S. 869, to the United States Court of Appeals for the Second Circuit. The motion of the respondent for leave to proceed *in forma pauperis* is granted. *Leon B. Polsky* for respondent. Reported below: 300 F. 2d 345.

No. 479. WONG SUN ET AL. *v.* UNITED STATES. Certiorari, 368 U. S. 817, to the United States Court of Appeals for the Ninth Circuit. Argued March 29 and April 2, 1962. This case is restored to the calendar for reargument. *Edward Bennett Williams* (appointed by this Court, 368 U. S. 973) argued the cause and filed a supplemental brief for petitioners. *Sol A. Abrams* also filed a brief for petitioners. *Solicitor General Cox* argued the cause for the United States. With him on the briefs were *Assistant Attorney General Miller, Beatrice Rosenberg, J. F. Bishop* and *Julia P. Cooper*. Reported below: 288 F. 2d 366.

Certiorari Granted. (*See also No. 773, ante, p. 154.*)

No. 868. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. C. A. 6th Cir. Certiorari granted. *Charles I. Dawson, Harold C. Heiss, Russell B. Day, Harold N. McLaughlin, Wayland K. Sullivan* and *V. C. Shuttleworth* for petitioners. *John P. Sandidge, H. G. Breetz, W. L. Grubbs, M. D. Jones* and *Joseph L. Lenihan* for respondent. Reported below: 297 F. 2d 608.

No. 890, Misc. GIDEON *v.* COCHRAN, CORRECTIONS DIRECTOR. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Florida granted. Case transferred to the appellate docket. In addition to other questions presented by this case, counsel are requested to discuss the following in their briefs and oral argument: "Should this Court's holding in *Betts* v. *Brady*, 316 U. S. 455, be reconsidered?" Petitioner *pro se*. *Richard W. Ervin*, Attorney General of Florida, and *Bruce R. Jacob*, Assistant Attorney General, for respondent.

Certiorari Denied. (See also No. 861, ante, p. 158; and No. 1092, Misc., ante, p. 157.)

No. 728. UNITED STATES *v.* EVANS ET AL. C. A. 3d Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. *Robert L. Kirkpatrick* and *John A. McCann* for respondents. Reported below: 295 F. 2d 713.

No. 761. MODE *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Charles J. Lincoln* for petitioner. *Frank Holt,* Attorney General of Arkansas, and *Thorp Thomas,* Assistant Attorney General, for respondent. Reported below: 231 Ark. 477, 330 S. W. 2d 88; 234 Ark. 46, 350 S. W. 2d 675.

No. 875. SHENANDOAH CORP. *v.* JACKSON. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Nathan L. Silberberg* for petitioner. *Barrington D. Parker* for respondents. Reported below: 111 U. S. App. D. C. 410, 298 F. 2d 324.

No. 876. GELLER ET AL. *v.* HOLLAND-AMERICA LINE. C. A. 2d Cir. Certiorari denied. *Robert S. Blanc, Jr.* for petitioners. *Eugene Underwood* for respondent. Reported below: 298 F. 2d 618.

No. 879. F. P. BAUGH, INC., *v.* LITTLE LAKE LUMBER CO. ET AL. C. A. 9th Cir. Certiorari denied. *Stanley A. Weigel* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Fred E. Youngman* for the United States, respondent. *Richard J. Archer* filed a brief for the California Bankers Association, as *amicus curiae,* in support of the petition. Reported below: 297 F. 2d 692.

No. 877. FELDMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Allen S. Stim* and *Menahem Stim* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Loevinger* for the United States. Reported below: 299 F. 2d 914.

No. 880. APPLEBY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Robert V. Carton* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *L. W. Post* for respondent. Reported below: 296 F. 2d 925.

No. 883. CHENU, ADMINISTRATOR, *v.* BOARD OF TRUSTEES, POLICE PENSION FUND, ARTICLE NO. 1, ET AL. Court of Appeals of New York. Certiorari denied. *Joseph L. Forscher* for petitioner. *Adrien E. Laurencelle, Jr.* and *Mario Matthew Cuomo* for respondents. Reported below: See 12 App. Div. 2d 422, 212 N. Y. S. 2d 818.

No. 886. FRASCONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 299 F. 2d 824.

No. 891. ESTATE OF CARTER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Lynn M. Ewing, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Norman H. Wolfe* for respondent. Reported below: 298 F. 2d 192.

No. 892. WOODS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Howard T. Savage* for petitioner. Reported below: 23 Ill. 2d 471, 179 N. E. 2d 11.

No. 884. R. A. HOLMAN & Co., INC., *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton V. Freeman, Edgar H. Brenner* and *Stanley D. Halperin* for petitioner. *Solicitor General Cox, Peter A. Dammann* and *David Ferber* for the Securities and Exchange Commission, respondent. Reported below: 112 U. S. App. D. C. 43, 299 F. 2d 127.

No. 888. JOHN V. BOLAND CONSTRUCTION CO. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Scott G. Rigby* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: — Ct. Cl. —

No. 894. TENNESSEE PRODUCTS & CHEMICAL CORP. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Robert N. Anderson* and *Kenneth E. Levin* for the United States. Reported below: 297 F. 2d 529.

No. 898. KOHLER CO. *v.* LOCAL 833, UAW–AFL–CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lyman C. Conger, Edward J. Hammer* and *William F. Howe* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Joseph L. Rauh, Jr., John Silard, Harold A. Cranefield, Louis H. Pollak* and *David Rabinovitz* for Local 833, respondents. Reported below: 112 U. S. App. D. C. 107, 300 F. 2d 699.

No. 897. SKONTOS, ALIAS SKOUNDRIANOS, *v.* GEKAS. Supreme Court of Illinois. Certiorari denied. *Peter S. Sarelas* for petitioner. *John C. Gekas* and *James P. Economos* for respondent.

No. 899. UNIVERSAL TERMINAL & STEVEDORING CORP. *v.* ISBRANDTSEN CO., INC. Court of Appeals of New York. Certiorari denied. *Patrick E. Gibbons* for petitioner. *Lawrence J. Mahoney* and *Robert J. Giuffra* for respondent. Reported below: 11 N. Y. 2d 690, 180 N. E. 2d 914.

No. 904. DAVISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David R. Shelton* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Robert N. Anderson* for the United States. Reported below: 299 F. 2d 611.

No. 905. HARDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David R. Shelton* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Robert N. Anderson* for the United States. Reported below: 299 F. 2d 600.

No. 906. FINOCCHAIRO *v.* KELLY, COMMISSIONER OF MOTOR VEHICLES. Court of Appeals of New York. Certiorari denied. *George H. Brown* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, and *Ruth Kessler Toch,* Assistant Solicitor General, for respondent. Reported below: 11 N. Y. 2d 58, 181 N. E. 2d 427.

No. 969, Misc. EIDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 296 F. 2d 736.

No. 1060, Misc. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1100, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 111 U. S. App. D. C. 276, 296 F. 2d 398.

No. 1111, Misc. MOORE *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Winifred C. Stanley*, Assistant Attorney General, for respondent.

No. 1126, Misc. LAWRENSON *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *George M. Radcliffe* for respondent. Reported below: 298 F. 2d 890.

No. 1263, Misc. CRAWFORD *v.* BANNAN, WARDEN, ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and for other relief denied.

No. 1442, Misc. BUSCH *v.* CALIFORNIA. Application for stay and petition for writ of certiorari to the Supreme Court of California denied. *Al Matthews* for petitioner.

Rehearing Denied.

No. 715. FLECK ET AL. *v.* CLEVELAND BAR ASSOCIATION, 369 U. S. 861;

No. 748. SIMPSON, DOING BUSINESS AS MID-SEVEN TRANSPORTATION CO., *v.* UNITED STATES, 369 U. S. 526; and

No. 818. UNITED STATES LINES CO. ET AL. *v.* VAN CARPALS, 369 U. S. 865. Petitions for rehearing denied.

JUNE 11, 1962.*

Probable Jurisdiction Noted.

No. 923. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* BOSTON & MAINE RAILROAD ET AL.;

No. 924. MARYLAND PORT AUTHORITY ET AL. *v.* BOSTON & MAINE RAILROAD ET AL.; and

No. 925. INTERSTATE COMMERCE COMMISSION *v.* BOSTON & MAINE RAILROAD ET AL. Appeals from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. MR. JUSTICE WHITE took no part in the consideration or decision of these cases. *Jervis Langdon, Jr., Richard R. Bongartz, Robert B. Claytor, John Henry Lewin* and *William C. Purnell* for appellants in No. 923. *William L. Marbury, Chas. R. Seal, J. Cookman Boyd, Jr., Donald Macleay, John Martin Jones, Jr., Morris Duane, Warren Price, Jr., David Berger* and *Robert M. Beckman* for appellants in No. 924. *Robert W. Ginnane* and *I. K. Hay* for appellant in No. 925. *John H. Colgren, Robert G. Bleakney, Jr., Thomas P. Hackett, Henry E. Foley, John F. Reilly, Raymond W. Troy, Louis J. Lefkowitz, Dunton F. Tynan, Walter J. Myskowski, Leo A. Larkin, Charles W. Merritt, Sidney Goldstein, F. A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman* and *James M. Henderson* for appellees. Reported below: 202 F. Supp. 830.

*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

Certiorari Granted.

No. 858. McLeod, Regional Director, National Labor Relations Board, *v.* Empresa Hondurena de Vapores, S. A. C. A. 2d Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Orison S. Marden* and *Chester Bordeau* for respondent. Reported below: 300 F. 2d 222.

No. 862. National Maritime Union of America, AFL–CIO, *v.* Empresa Hondurena de Vapores, S. A. C. A. 2d Cir. Certiorari granted. *Herman E. Cooper* and *H. Howard Ostrin* for petitioner. *Orison S. Marden* and *Chester Bordeau* for respondent. Reported below: 300 F. 2d 222.

No. 942. McCulloch, Chairman, National Labor Relations Board, et al. *v.* Sociedad Nacional de Marineros de Honduras et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioners. *Charles S. Rhyne, Brice W. Rhyne* and *Thomas P. Brown III* for respondents.

No. 922. United States *v.* Buffalo Savings Bank. Court of Appeals of New York. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph Kovner* and *George F. Lynch* for the United States. *John Horace Little* for respondent. Reported below: 11 N. Y. 2d 31, 181 N. E. 2d 413.

Certiorari Denied.

No. 908. Anderson *v.* Knox. C. A. 9th Cir. Certiorari denied. *Ivan E. Lawrence* for petitioner. *J. Russell Cades* for respondent. Reported below: 297 F. 2d 702.

No. 845. OUACHITA PARISH SCHOOL BOARD *v.* STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS. Supreme Court of Louisiana. Certiorari denied. *George M. Snellings, Jr.* for petitioner. *Norman L. Sisson* for respondent. Reported below: 242 La. 682, 138 So. 2d 109.

No. 872. ST. MARY PARISH SCHOOL BOARD *v.* TERREBONNE PARISH SCHOOL BOARD. Supreme Court of Louisiana. Certiorari denied. *Jack C. Caldwell* for petitioner. *George Arceneaux, Jr.* for respondent. Reported below: 242 La. 667, 138 So. 2d 104.

No. 890. HILL ET AL., DOING BUSINESS AS ALASKA MARKET, *v.* MOE ET AL. Supreme Court of Alaska. Certiorari denied. *Frank C. Mueller* for petitioners. Reported below: —— Alaska ——, 367 P. 2d 739.

No. 901. VON DER HEYDT ET AL. *v.* KENNEDY, ATTORNEY GENERAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Isadore G. Alk, Irving Moskovitz* and *Peter N. Schiller* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Bruno A. Ristau* for respondents. Reported below: 112 U. S. App. D. C. 79, 299 F. 2d 459.

No. 903. RISS & COMPANY, INC., *v.* ASSOCIATION OF WESTERN RAILWAYS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. Alvis Layne* and *Lester M. Bridgeman* for petitioner. *Stuart S. Ball, Hugh B. Cox* and *James H. McGlothlin* for respondents. Reported below: 112 U. S. App. D. C. 49, 299 F. 2d 133.

No. 275. WINCKLER & SMITH CITRUS PRODUCTS CO. ET AL. *v.* SUNKIST GROWERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. *William C. Dixon* and *Holmes Baldridge* for petitioners. *Ross C. Fisher* and *Herman F. Selvin* for respondents. Reported below: 284 F. 2d 1.

No. 865. SIMMONS *v.* KANSAS CITY SOUTHERN RAILWAY CO. Court of Civil Appeals of Texas, Ninth Supreme Judicial District. Certiorari denied. *Franklin Jones* and *Scott Baldwin* for petitioner. *Howell Cobb* for respondent. Reported below: 350 S. W. 2d 884.

No. 870. SCHAEFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Francis S. Clamitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 299 F. 2d 625.

No. 881. EXPOSITION PRESS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *Jules R. Teitler* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum, James McI. Henderson* and *Jno. W. Carter, Jr.* for respondent. Reported below: 295 F. 2d 869.

No. 887. DIDONATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James J. Hanrahan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 301 F. 2d 383.

No. 914. BAUMGARTEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 300 F. 2d 807.

No. 902. HECLA MINING CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Valentine Brookes* and *Paul E. Anderson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Lee A. Jackson* and *Harry Marselli* for the United States. Reported below: 302 F. 2d 204.

No. 912. PAWNEE INDIAN TRIBE OF OKLAHOMA *v.* UNITED STATES. Court of Claims. Certiorari denied. *John M. Wheeler* and *John Wheeler, Jr.* for petitioner. *Solicitor General Cox, Roger P. Marquis, Ralph A. Barney* and *Hugh Nugent* for the United States. Reported below: — Ct. Cl. —, 301 F. 2d 667.

No. 915. FLORES *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Hume Cofer* and *John D. Cofer* for petitioner. Reported below: — Tex. Cr. R. —, 353 S. W. 2d 852.

No. 916. IN RE MAGNUS ET AL. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 299 F. 2d 335.

No. 919. GONDECK *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Arthur Roth* and *Norman Miller* for petitioner. *Leo M. Alpert* for respondents. Reported below: 299 F. 2d 74.

No. 929. ELLIS RESEARCH LABORATORIES, INC., ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Cannon* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *William W. Goodrich* for the United States.

No. 909. PHILAMON LABORATORIES, INC., *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. *Sanford H. Markham* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 298 F. 2d 176.

No. 911. SOLER *v.* BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA. Supreme Court of Pennsylvania. Certiorari denied. *Osmond K. Fraenkel* and *A. Harry Levitan* for petitioner. *Edward B. Soken* for respondent. Reported below: 406 Pa. 168, 176 A. 2d 653.

No. 921. UNITED STATES PIPE & FOUNDRY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *Douglas Arant, John J. Coleman, Jr.* and *E. L. All* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 298 F. 2d 873.

No. 927. BECK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application. *Charles S. Burdell* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burt J. Abrams* for the United States. Reported below: 298 F. 2d 622.

No. 949. LITTERAL ET AL. *v.* INDEMNITY INSURANCE COMPANY OF NORTH AMERICA. C. A. 7th Cir. Certiorari denied. *C. E. Tate* and *John Alan Appleman* for petitioners. *Horace E. Gunn* for respondent. Reported below: 300 F. 2d 340.

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No. 952. FREEMAN, SECRETARY OF AGRICULTURE, ET AL. *v.* ARMOUR & Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Sherman L. Cohn* for petitioners. *Herbert Brownell, Thomas F. Daly, Harry A. Inman* and *George E. Leonard* for respondent.

Rehearing Denied.

No. 373, October Term, 1958. CAMERON IRON WORKS, INC., *v.* LODGE No. 12, DISTRICT No. 37, INTERNATIONAL ASSOCIATION OF MACHINISTS, 358 U. S. 880. Motion for leave to file petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 214. HOHENSEE *v.* NEWS SYNDICATE, INC., 369 U. S. 659;

No. 841. HERMAN SCHWABE, INC., *v.* UNITED SHOE MACHINERY CORP., 369 U. S. 865;

No. 588, Misc. KOSTAL ET AL. *v.* STONER, JUDGE, ET AL., 369 U. S. 868;

No. 870, Misc. GENSBURG *v.* CALIFORNIA STATE LEGISLATURE ET AL., 369 U. S. 875; and

No. 1192, Misc. DUKES *v.* SAIN, SHERIFF, 369 U. S. 868. Petitions for rehearing denied.

No. 920, Misc. WARREN *v.* LARSON, STATE TREASURER, 369 U. S. 427. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

JUNE 18, 1962.*

Miscellaneous Orders.

No. 1049, Misc. PARMER *v.* ILLINOIS. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent.

No. 1138, Misc. FRENCH *v.* COX, WARDEN, ET AL.;
No. 1246, Misc. NEAL *v.* CALIFORNIA;
No. 1279, Misc. HICKS *v.* MICHIGAN ET AL.; and
No. 1292, Misc. DAUGHERTY *v.* TINSLEY, WARDEN.
Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 959. GRAY, CHAIRMAN OF THE GEORGIA STATE DEMOCRATIC EXECUTIVE COMMITTEE, ET AL. *v.* SANDERS. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. Motion to advance denied. MR. JUSTICE HARLAN would note probable jurisdiction and deny the motion to advance, with leave to the appellants to apply to this Court for a stay of the injunction order of the District Court pending determination of this appeal. *Eugene Cook,* Attorney General of Georgia, *B. D. Murphy* and *E. Freeman Leverett,* Deputy Assistant Attorneys General, and *Lamar W. Sizemore* for appellants. *Herman Heyman, Morris B. Abram* and *Robert E. Hicks* for appellee. Reported below: 203 F. Supp. 158.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

Certiorari Granted. (*See No. 782, ante, p. 292, and No. 841, Misc., ante, p. 293.*)

Certiorari Denied. (*See also No. 1141, Misc., ante, p. 290, and No. 1269, Misc., ante, p. 291.*)

No. 913. ANCHOR LINE, LTD., ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Ronald A. Capone, Cletus Keating* and *Elmer C. Maddy* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Irwin A. Seibel, Robert E. Mitchell* and *Edward Schmeltzer* for respondents. Reported below: 112 U. S. App. D. C. 40, 299 F. 2d 124.

No. 928. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION ET AL. *v.* GEORGIA PORTS AUTHORITY. Supreme Court of Georgia. Certiorari denied. *Sewall Myer* for petitioners. *Eugene Cook,* Attorney General of Georgia, and *Anton F. Solms, Jr.* for respondent. Reported below: 217 Ga. 712, 124 S. E. 2d 733.

No. 935. BALLENGER PAVING CO., INC., *v.* GOLDBERG, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. *John Izard, Jr.* for petitioner. *Solicitor General Cox, Charles Donahue, Jacob I. Karro* and *Isabelle R. Cappello* for respondent. Reported below: 299 F. 2d 297.

No. 948. YOUNG ET AL. *v.* MOTION PICTURE ASSOCIATION OF AMERICA ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David I. Shapiro, Ben Margolis, A. L. Wirin* and *Fred Okrand* for petitioners. *William P. Rogers* for respondents. Reported below: 112 U. S. App. D. C. 35, 299 F. 2d 119.

No. 926. GULF POWER CO. *v.* SHAHID ET AL. C. A. 5th Cir. Certiorari denied. *E. Dixie Beggs* for petitioner. Reported below: 291 F. 2d 422; 298 F. 2d 793.

No. 933. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *John J. Wilson* and *Philip S. Peyser* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 300 F. 2d 525.

No. 934. MILLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Mark H. Johnson* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 299 F. 2d 706.

No. 939. KNIGHT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph H. Davis* and *J. Sewell Elliott* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 297 F. 2d 675.

No. 947. FULLER BRUSH CO. *v.* FULLER PRODUCTS CO. C. A. 7th Cir. Certiorari denied. *W. Mahlon Dickerson* and *Harold Johnson* for petitioner. *Theodore W. Miller* and *Fleetwood M. McCoy* for respondent. Reported below: 299 F. 2d 772.

No. 951. NASSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *N. George Nasser* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 301 F. 2d 243.

No. 954. ALAMANCE INDUSTRIES, INC., ET AL. *v.* TRIUMPH HOSIERY MILLS, INC., ET AL. C. A. 4th Cir. Certiorari denied. *Jay H. Topkis* for petitioners. *Thornton H. Brooks, John W. Malley* and *Carl G. Love* for respondents. Reported below: 299 F. 2d 793.

No. 973. NATIONAL BISCUIT CO. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *George R. Fearon* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for respondent. Reported below: 11 N. Y. 2d 743, 181 N. E. 2d 457.

No. 1010. PACIFIC MARITIME ASSOCIATION *v.* SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, PACIFIC DISTRICT, ET AL.; and

No. 1017. PACIFIC COAST MARINE FIREMEN, OILERS, WATERTENDERS and WIPERS ASSOCIATION ET AL. *v.* PACIFIC MARITIME ASSOCIATION ET AL. C. A. 9th Cir. Certiorari denied. *J. Paul St. Sure, Richard Ernst, Warner W. Gardner* and *Lawrence J. Latto* for Pacific Maritime Association. *Duane B. Beeson* for Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *Alan S. Rosenthal* for the United States in opposition. Reported below: 304 F. 2d 437.

No. 938. MORGANO *v.* PILLIOD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Anna R. Lavin* and *Richard E. Gorman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 299 F. 2d 217.

No. 716. ABBRESCIA *v.* UNITED STATES;

No. 895. DORAN *v.* UNITED STATES; and

No. 956. GRIECO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Julius Lucius Echeles* for petitioners in Nos. 716 and 895. *Frank W. Oliver* for petitioner in No. 956. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 299 F. 2d 511.

No. 885. WILLIAMS *v.* HOT SHOPPES, INC. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *John J. Carmody, Charles J. Steele* and *John J. Carmody, Jr.* for respondent. Reported below: See 110 U. S. App. D. C. 358, 293 F. 2d 835.

No. 910. WILBURN BOAT CO. ET AL. *v.* FIREMAN'S FUND INSURANCE CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Hobert Price* and *T. G. Schirmeyer* for petitioners. *Edward B. Hayes* and *Joe A. Keith* for respondent. Reported below: 300 F. 2d 631.

No. 39, Misc. BAILEY *v.* SACKS, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Mark McElroy*, Attorney General of Ohio, and *Aubrey A. Wendt*, Assistant Attorney General, for respondents.

No. 223, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 267, Misc. FOSTER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson*, Attorney General of West Virginia, *George H. Mitchell* and *Simon M. Bailey*, Assistant Attorneys General, for respondent.

No. 294, Misc. IN RE SMITH. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 568, Misc. GAMBLE *v.* SACKS, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Mark McElroy*, Attorney General of Ohio, and *Aubrey A. Wendt*, Assistant Attorney General, for respondent.

No. 595, Misc. SMITH *v.* SETTLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for respondents.

No. 760, Misc. LYONS ET AL. *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioners *pro se*. *Robert L. Marrs* for respondent.

No. 792, Misc. PELIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank D. O'Connor* and *Benj. J. Jacobson* for respondent.

No. 1109, Misc. BOLES *v.* HEARD, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson*, Attorney General of Texas, and *Sam R. Wilson, Linward Shivers* and *Charles R. Lind*, Assistant Attorneys General, for respondent.

No. 895, Misc. BROUGHTON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 903, Misc. SLAUGHTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 974, Misc. SMITH *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 1020, Misc. PUGH *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 1074, Misc. STONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles L. Abernethy, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 298 F. 2d 441.

No. 1112, Misc. BANTZ *v.* KLINGER, SUPERINTENDENT, CALIFORNIA MEN'S COLONY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1129, Misc. BERRY *v.* STATE BOARD OF PAROLE OF COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 1130, Misc. HUNTER *v.* MYERS, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 1128, Misc. PATE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 297 F. 2d 166.

No. 1133, Misc. OWINGS *v.* JAMIESON, SHERIFF, ET AL. Supreme Court of New Jersey. Certiorari denied. *Rudolph L. Zalowitz* for petitioner.

No. 1134, Misc. LINKLETTER *v.* WALKER, WARDEN, ET AL. Supreme Court of Louisiana. Certiorari denied.

No. 1135, Misc. KELLEY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Robert Wood Tullis* for petitioner. Reported below: 23 Ill. 2d 193, 177 N. E. 2d 830.

No. 1136, Misc. VALENTIN *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1137, Misc. JENKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 293 F. 2d 96.

No. 1145, Misc. WHITTINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1417, Misc. JOHNSON ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *M. Gene Haeberle, Stanford Shmukler* and *Curtis R. Reitz* for petitioners.

No. 1132, Misc. TRUEBLOOD *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. *Samuel D. Menin* for petitioner. *J. F. Brauer*, Assistant Attorney General of Colorado, for respondent. Reported below: 148 Colo. —, 366 P. 2d 655.

No. 1309, Misc. CUMMINGS *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1120, Misc. SELF *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John D. Blankenship* for petitioner. *Charles O. Carroll* and *Joel A. C. Rindal* for respondent. Reported below: 59 Wash. 2d 62, 366 P. 2d 193.

No. 1172, Misc. GARNER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gregory S. Stout* for petitioner. *Stanley Mosk*, Attorney General of California, *William E. James*, Assistant Attorney General, and *Jack E. Goertzen*, Deputy Attorney General, for respondent. Reported below: 57 Cal. 2d 135, 367 P. 2d 680.

JUNE 25, 1962.*

Miscellaneous Orders.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. In the light of the concessions that no State will proceed with any action, other than discovery proceedings, the motion for temporary injunctions is denied.

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*MR. JUSTICE FRANKFURTER took no part in the consideration or decision of cases in which orders were this day announced.

No. 8, Original. ARIZONA *v.* CALIFORNIA ET AL. The petition of the Special Master for the payment of an additional fee is granted and the parties are ordered to make additional payments totaling $50,000 to *Simon H. Rifkind, Esquire,* Special Master, on account of the fee to be awarded by this Court as compensation for his services as Special Master. Such payments are to be made in the following proportions: Arizona, 28%; California, 28%; United States, 28%; Nevada, 12%; New Mexico, 2%; and Utah, 2%. This order is subject to such further award, allowance or division of costs or fees as this Court may deem proper for his past or future services. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. [For earlier orders herein, see 344 U. S. 806, 919; 345 U. S. 914, 968; 347 U. S. 985, 986; 348 U. S. 947; 350 U. S. 114, 812, 880, 955; 351 U. S. 977; 354 U. S. 918; 357 U. S. 902; 364 U. S. 940; 368 U. S. 893, 917, 950; *ante,* p. 906.]

No. 476. DOUGLAS ET AL. *v.* CALIFORNIA. Certiorari, 368 U. S. 815, to the Supreme Court of California. Argued April 17, 1962. This case is restored to the calendar for reargument. *Burton Marks* and *Marvin M. Mitchelson* argued the cause and filed a brief for petitioners. *Jack Goertzen,* Deputy Attorney General of California, and *William E. James,* Assistant Attorney General, argued the cause for respondent. With them on the brief was *Stanley Mosk,* Attorney General. Reported below: See 187 Cal. App. 2d 802, 10 Cal. Rptr. 188.

No. 771. PEARLMAN, TRUSTEE IN BANKRUPTCY, *v.* RELIANCE INSURANCE CO. Certiorari, 369 U. S. 847, to the United States Court of Appeals for the Second Circuit. The motion of John G. Street, Jr., for leave to file brief, as *amicus curiae,* is granted. Reported below: 298 F. 2d 655.

No. 477. YELLIN *v.* UNITED STATES. Certiorari, 368 U. S. 816, to the United States Court of Appeals for the Seventh Circuit. Argued April 18–19, 1962. This case is restored to the calendar for reargument. *Victor Rabinowitz* argued the cause for petitioner. With him on the briefs was *Leonard B. Boudin*. *Bruce J. Terris* argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls, Kevin T. Maroney* and *Lee B. Anderson*. Reported below: 287 F. 2d 292.

No. 799. UNITED STATES *v.* PHILADELPHIA NATIONAL BANK ET AL. Appeal from the United States District Court for the Eastern District of Pennsylvania (probable jurisdiction noted, 369 U. S. 883); and

No. 1037. HONEYWOOD ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from the United States District Court for the Eastern District of New York. The motions to advance are denied.

No. 1018. CONNECTICUT COMMITTEE AGAINST PAY TV ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. The motion of RKO General Phonevision Company to be named a party respondent is granted.

No. 928, Misc. HAYES *v.* MARYLAND. The motion for leave to file a petition for writ of habeas corpus is denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is granted and the case is transferred to the United States District Court for the District of Maryland. *Chaapel* v. *Cochran*, 369 U. S. 869. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Robert F. Sweeney*, Assistant Attorney General, for respondent.

No. 1011. GIDEON *v.* COCHRAN, CORRECTIONS DIRECTOR. Certiorari, *ante*, p. 908, to the Supreme Court of Florida. The motion for the appointment of counsel is granted and it is ordered that *Abe Fortas, Esquire*, of Washington, D. C., a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1157, Misc. KANE *v.* LAVALLEE, WARDEN;
No. 1206, Misc. WILBORN *v.* CALIFORNIA;
No. 1287, Misc. VAN PELT *v.* CALIFORNIA ET AL.;
No. 1334, Misc. WHITTINGTON *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT;
No. 1343, Misc. HARTFORD *v.* WICK, HOSPITAL DIRECTOR;
No. 1408, Misc. THOMAS *v.* HERITAGE, WARDEN;
No. 1430, Misc. EX PARTE SCHLETTE;
No. 1448, Misc. HAMMOND *v.* LANGLOIS, WARDEN, ET AL.; and
No. 1458, Misc. FARRO *v.* KENTON, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1183, Misc. SNOW *v.* PATE, WARDEN;
No. 1184, Misc. KING *v.* MCNEILL, HOSPITAL DIRECTOR;
No. 1341, Misc. BLACK *v.* UNITED STATES;
No. 1432, Misc. LAWRENSON *v.* ANDERSON, JAIL SUPERINTENDENT; and
No. 1438, Misc. WOOTEN *v.* BOMAR, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 1140, Misc. RYAN *v.* BUCHKOE, WARDEN; and
No. 1429, Misc. PIERRE *v.* CALIFORNIA. Motions for leave to file petitions for habeas corpus and for other relief denied.

No. 997, Misc. KOACHES *v.* COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA;

No. 1283, Misc. WATTS *v.* CASTLE, CIRCUIT JUDGE;

No. 1296, Misc. WATSON *v.* HOOPER, JUDGE;

No. 1376, Misc. WEBB *v.* COMPTON, CHIEF JUSTICE OF THE SUPREME COURT OF NEW MEXICO; and

No. 1444, Misc. BARKER *v.* SUPREME COURT OF OHIO. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 937. NEW JERSEY ET AL. *v.* NEW YORK, SUSQUEHANNA & WESTERN RAILROAD CO. Appeal from the United States District Court for the District of New Jersey. Probable jurisdiction noted. *Arthur J. Sills,* Attorney General of New Jersey, and *William Gural,* Deputy Attorney General, for appellants. *Vincent P. Biunno* and *Charles H. Hoens, Jr.* for appellee. Reported below: 200 F. Supp. 860.

No. 969. BANTAM BOOKS, INC., ET AL. *v.* SULLIVAN ET AL. Appeal from the Superior Court of Rhode Island. Probable jurisdiction noted. *Horace S. Manges* for appellants. Reported below: See —— R. I. ——, 176 A. 2d 393.

Certiorari Granted. (*See also No. 388, Misc., ante, p. 721; No. 447, Misc., ante, p. 724; No. 535, Misc., ante, p. 725; No. 928, Misc., supra; No. 965, Misc., ante, p. 722; Misc. Nos. 1191 and 1234, ante, p. 723; No. 1274, Misc., ante, p. 727; and No. 1357, Misc., ante, p. 728.*)

No. 80. LYNUM *v.* ILLINOIS. Supreme Court of Illinois. Certiorari granted. *Jewel Stradford Rogers* for petitioner. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 21 Ill. 2d 63, 171 N. E. 2d 17.

No. 995. WILLNER *v.* COMMITTEE ON CHARACTER AND FITNESS, APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT. Court of Appeals of New York. Certiorari granted. *Henry Waldman* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, for respondent. Reported below: See 11 N. Y. 2d 866, 182 N. E. 2d 288.

No. 85. AVENT ET AL. *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari granted. *Jack Greenberg, James M. Nabrit III, William A. Marsh, Jr., F. B. McKissick, C. O. Pearson, M. Hugh Thompson, William T. Coleman, Jr., Louis H. Pollak, Charles A. Reich* and *Spottswood W. Robinson III* for petitioners. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, for respondent. Reported below: 253 N. C. 580, 118 S. E. 2d 47.

No. 694. GOBER ET AL. *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari granted. *Jack Greenberg, Constance Baker Motley, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., James M. Nabrit III* and *Louis H. Pollak* for petitioners. *Earl McBee* for respondent. Reported below: — Ala. App. —, 133 So. 2d 697.

No. 721. SHUTTLESWORTH ET AL. *v.* CITY OF BIRMINGHAM. Court of Appeals of Alabama. Certiorari granted. *Jack Greenberg, Constance Baker Motley, Arthur D. Shores, Orzell Billingsley, Peter A. Hall, Oscar Adams* and *James M. Nabrit III* for petitioners. *Earl McBee* for respondent. Reported below: — Ala. App. —, 134 So. 2d 213; — Ala. App. —, 134 So. 2d 214.

No. 287. GRIFFIN ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari granted. *Joseph L. Rauh, Jr., John Silard, Thurgood Marshall, Jack Greenberg* and *James M. Nabrit III* for petitioners. *Thomas B. Finan,* Attorney General of Maryland, and *Clayton A. Dietrich,* Assistant Attorney General, for respondent. Reported below: 225 Md. 422, 171 A. 2d 717.

No. 638. LOMBARD ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. Petitioners *pro se.* *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, *Richard A. Dowling* and *J. David McNeill* for respondent. Reported below: 241 La. 958, 132 So. 2d 860.

No. 750. PETERSON ET AL. *v.* CITY OF GREENVILLE. Supreme Court of South Carolina. Certiorari granted. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Matthew J. Perry, Lincoln C. Jenkins, Jr.* and *Willie T. Smith* for petitioners. *Thomas A. Wofford* and *Theodore A. Snyder, Jr.* for respondent. Reported below: 239 S. C. 298, 122 S. E. 2d 826.

No. 729. WRIGHT ET AL. *v.* GEORGIA. Supreme Court of Georgia. Certiorari granted. *Jack Greenberg* and *Constance Baker Motley* for petitioners. *Eugene Cook,* Attorney General of Georgia, *G. Hughel Harrison,* Assistant Attorney General, *Andrew J. Ryan, Jr.,* Solicitor General, and *Sylvan A. Garfunkel,* Assistant Solicitor General, for respondent. Reported below: 217 Ga. 453, 122 S. E. 2d 737.

No. 817, Misc. DRAPER ET AL. *v.* WASHINGTON ET AL. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Washington granted. Case transferred to the appellate docket. Reported below: 58 Wash. 2d 830, 365 P. 2d 31.

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No. 966. DELANO-EARLIMART IRRIGATION DISTRICT ET AL. *v.* RANK ET AL. C. A. 9th Cir. Certiorari granted. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Denver C. Peckinpah, Adolph Moskovitz, James K. Abercrombie, Irl Davis Brett* and *J. O. Reavis* for petitioners. *John H. Lauten* and *Claude L. Rowe* for respondents. Reported below: 293 F. 2d 340; 307 F. 2d 96.

No. 996, Misc. SANDERS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 297 F. 2d 735.

Certiorari Denied. (*See also No. 1124, Misc., ante, p. 720; No. 1153, Misc., ante, p. 721; and Misc. Nos. 1183, 1184, 1341, 1432 and 1438, supra.*)

No. 237. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. *v.* SWITCHMEN'S UNION OF NORTH AMERICA ET AL. C. A. 2d Cir. Certiorari denied. *Kenneth F. Burgess* for petitioners. *Ruth Weyand* for respondents. Reported below: 292 F. 2d 61.

No. 671. LARSEN *v.* LADD, COMMISSIONER OF PATENTS. United States Court of Customs and Patent Appeals. Certiorari denied. *Dean Laurence* and *Herbert I. Sherman* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 49 C. C. P. A. (Pat.) 711, 292 F. 2d 531.

No. 722. MOORE-McCORMACK LINES, INC., *v.* RICHARDSON, EXECUTRIX, ET AL. C. A. 2d Cir. Certiorari denied. *Eugene Underwood* for petitioner. *Henry N. Longley, Benjamin H. Siff, Bernard Rolnick* and *Louis R. Harolds* for respondents. Reported below: 295 F. 2d 583.

No. 800. CROWN ZELLERBACH CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Arthur H. Dean, Howard T. Milman* and *Philip S. Ehrlich* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Lionel Kestenbaum* and *James McI. Henderson* for respondent. Reported below: 296 F. 2d 800.

No. 823. PAN AMERICAN PETROLEUM CORP. *v.* KANSAS-NEBRASKA NATURAL GAS CO., INC. C. A. 8th Cir. Certiorari denied. *William J. Grove, Carroll L. Gilliam, Byron M. Gray, W. W. Heard* and *Wm. H. Emerson* for petitioner. *Oscar Cox, Malcolm S. Langford, James D. Conway* and *Richard B. Berryman* for respondent. *Solicitor General Cox, Ralph S. Spritzer, Richard A. Solomon, Howard E. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission, and *George D. Horning, Jr.* for Western Natural Gas Co., *amici curiae*. Reported below: 297 F. 2d 561.

No. 958. WASHINGTON-OREGON SHIPPERS COOPERATIVE ASSOCIATION, INC., *v.* SCHUMACHER ET AL., TAX COMMISSIONERS OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Sam A. Wright* for petitioner. *John J. O'Connell,* Attorney General of Washington, *John W. Riley,* Chief Assistant Attorney General, and *Timothy R. Malone,* Assistant Attorney General, for respondents. Reported below: 59 Wash. 2d 159, 367 P. 2d 112.

No. 943. SLAVITT *v.* UNITED STATES. Court of Claims. Certiorari denied. *Charlotte Slavitt pro se. Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: — Ct. Cl. —.

No. 955. FONG, TRADING AS ASIA DEVELOPMENT CORP., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Smith W. Brookhart, Ralph E. Becker, Benjamin H. Dorsey* and *F. Murray Callahan* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the United States. Reported below: 300 F. 2d 400.

No. 960. CANADIAN NATIONAL RAILWAY CO. *v.* TAYLOR. C. A. 2d Cir. Certiorari denied. *H. H. Powers* for petitioner. *Joseph A. McNamara* for respondent. Reported below: 301 F. 2d 1.

No. 965. MARQUES-ARBONA *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Supreme Court of Puerto Rico. Certiorari denied. *Santos P. Amadeo* for petitioner. *J. B. Fernandez Badillo,* Solicitor General of Puerto Rico, for respondent. Reported below: — P. R. —.

No. 1025. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA *v.* GOLDBERG, SECRETARY OF LABOR. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward Bennett Williams* and *Raymond W. Bergan* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Alan S. Rosenthal* and *Charles Donahue* for respondent. Reported below: 112 U. S. App. D. C. 391, 303 F. 2d 402.

No. 950. JACK DANIEL DISTILLERY, LEM MOTLOW, PROP., INC., *v.* HOFFMAN DISTILLING CO. ET AL. C. A. 6th Cir. Certiorari denied. *John J. Hooker, Joe E. Daniels* and *Chauncey P. Carter* for petitioner. *Charles B. Cannon, John K. Skaggs, Jr.* and *James E. Fahey* for respondents. Reported below: 298 F. 2d 606.

No. 964. MAIN LINE THEATRES, INC., ET AL. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Harry Norman Ball* for petitioners. *W. Bradley Ward, Samuel D. Slade, Louis J. Goffman* and *H. Francis DeLone* for respondents. Reported below: 298 F. 2d 801.

No. 974. ART NATIONAL MANUFACTURERS DISTRIBUTING CO. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, James McI. Henderson* and *Jno. W. Carter, Jr.* for respondent. Reported below: 298 F. 2d 476.

No. 977. FUNKHOUSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 299 F. 2d 940.

No. 981. MCCUE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Simon H. Rifkind, Samuel J. Silverman* and *George F. Lowman* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *J. William Doolittle* for the United States. Reported below: 301 F. 2d 452.

No. 1028. ATKINSON ET AL. *v.* CITY OF DALLAS. Supreme Court of Texas. Certiorari denied. Petitioners *pro se. Henry P. Kucera* for respondent.

No. 907. N. V. HANDELSBUREAU LA MOLA *v.* KENNEDY, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence S. Lesser* and *Dinsmore Adams* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Pauline B. Heller* for respondent. Reported below: 112 U. S. App. D. C. 92, 299 F. 2d 923.

MR. JUSTICE BLACK dissents:

The Trading with the Enemy Act [1] authorizes the Government to seize and confiscate under some circumstances the property of aliens. By its denial of certiorari in this case the Court leaves standing a judgment of confiscation [2] under circumstances which in my judgment the Act does not authorize. I therefore feel impelled to dissent.

In May 1940 Hitler's forces, violating the historic neutrality of the Netherlands, suddenly invaded that country, largely destroyed one of its finest cities and within a short time occupied the whole country. Although the United States soon recognized and allied itself with a group of Royal Netherlands citizens who had escaped and set up an independent government-in-exile in London,[3] that occupation continued until May 1945 when troops from this country and its allies finally managed to liberate the Netherlands from the German forces. Within several weeks this country's ally, the Free Netherlands Government, assumed lawful command of its own citizens and territory. It was not, however, until some five and a

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[1] 40 Stat. 411, as amended, 50 U. S. C. App. § 1 *et seq.*

[2] 112 U. S. App. D. C. 92, 299 F. 2d 923.

[3] See Mutual Aid Agreement between the United States and the Netherlands, July 8, 1942, 56 Stat. 1554; and Mutual Aid Agreement, April 30, 1945, 59 Stat. 1627.

half years later, long after the end of the Nazi occupation and the return of the lawful government of the Netherlands, that the Alien Property Custodian in 1951, purportedly acting under the Trading with the Enemy Act, seized and confiscated the four bank accounts in this country which belonged to the petitioning Dutch company and which form the object of this lawsuit. That confiscation of petitioner's property was sustained by the Court of Appeals on the sole ground that the Netherlands, our friend and ally, where petitioner was incorporated, had been overrun and occupied by Germany during the war. Because this result seems so contrary to the purpose of Congress in passing the Trading with the Enemy Act and raises such grave constitutional questions under the Fifth Amendment's command that the Government not take private property without paying just compensation, I think we should grant certiorari to review the Court of Appeals' decision.

The Trading with the Enemy Act provides that the President may seize "During the time of war" "any property in which any foreign country or any national thereof has or has had any interest." That Act also provides, however, that "Any person not an enemy or ally of enemy" may sue to compel the return of his property. And even though the Act defines an "enemy" as "Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war . . . and any corporation incorporated within such territory . . . ," it does not say, as did the Court of Appeals, that every corporation which was at any time present within the territory while that territory was occupied by an enemy is an "enemy" within the meaning of the Act. I do not see how it can be thought that Congress intended by this Act to authorize

the confiscation, between the end of actual occupation in 1945 and the official end of the war in 1951,[4] of every bit of property in this country owned by the citizens and corporations of the Netherlands, France, Norway, Belgium and other countries solely because those countries, our staunch friends and allies, had during the war been overrun by an enemy that was trying to destroy them and us.[5] I can understand how Congress might be thought to have desired to authorize the President to seize the property of citizens and corporations of friendly countries and allies when those countries were at the time being occupied by an enemy which might be able to use their property to carry on war against us. I do not believe, however, that Congress intended to place a permanent taint on the property of our friends so that whenever that property showed up in this country it might be seized—even though long after our friends' countries had been fortunate enough to escape the occupation clutches of our common enemy. It would be bad enough after the end of occupation to confiscate the property of friendly aliens which had been in this country during the occupation but to go beyond that and confiscate as here a bank account which did not even exist in this country until 1948, three years after the return of lawful government to the Netherlands, seems wholly contrary to any purpose Congress could have had in the Act. Moreover, to construe this statute this way raises serious questions about the constitutionality of the Act as applied, for it has long been settled that the provision of the Fifth Amendment requiring the payment of just compensation

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[4] Joint Resolution to terminate the state of war between the United States and the Government of Germany, October 19, 1951, 65 Stat. 451.

[5] Cf. *Willenbrock* v. *Rogers*, 255 F. 2d 236.

when private property is taken for public use protects friendly aliens as well as citizens.[6] And it is obviously no answer to this to say, as did the Court of Appeals, that the confiscation was proper because this Government needed the property after the war to support the cost of its past war efforts. Our constitutional guarantee against uncompensated government seizure of private property surely does not melt away merely because public officials believe the Government needs to seize property without paying for it.

This case would of course be far different if the Court of Appeals had rested on the two other grounds urged by the Government below: (1) that petitioner was "enemy-tainted," (2) and also that it was engaged in doing business in Germany which was enemy territory. But the Court of Appeals did not rest on either of these grounds and we must accept the case as it comes to us or fail to accord petitioner its full day in court. This is particularly true here, since the question of enemy domination, if litigated, would have to be decided in light of *Kaufman* v. *Societe Internationale*,[7] where we held that innocent stockholders even of enemy corporations must be protected from having their property confiscated.

It is true that the refusal of the Court to grant certiorari in this case gives no express approval to the interpretation of the Act made by the Court of Appeals and leaves that question open for final authoritative decision later. The Court's refusal to act now, however, does leave standing the Court of Appeals' decision as a precedent in the lower federal courts which will until reviewed here hang as a cloud over the property rights in this country of citizens of foreign countries.

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[6] *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491–492.

[7] 343 U. S. 156.

No. 957. SOBLEN *v.* UNITED STATES. The motion of Dr. Bernard Diamond et al. for leave to file brief, as *amici curiae,* is granted. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion and petition. *Ephraim London* and *Leonard B. Boudin* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. *William E. Haudek* for Dr. Bernard Diamond et al. *Norman Dorsen* and *Melvin L. Wulf* for the American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 301 F. 2d 236.

No. 962. POSS *v.* LIEBERMAN. The motion to dispense with printing the petition for certiorari is granted. The petition for writ of certiorari to the United States Court of Appeals for the Second Circuit is denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 299 F. 2d 358.

No. 1022. BOARD OF EDUCATION OF THE CITY OF MEMPHIS ET AL. *v.* NORTHCROSS ET AL. The motion of Memphis Citizens' Council for leave to file brief, as *amicus curiae,* is granted. The petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is denied. *Larry B. Creson* for petitioners. *Marvin Brooks Norfleet* for Memphis Citizens' Council. Reported below: 302 F. 2d 818.

No. 927, Misc. JACKSON *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 738, Misc. CALDWELL *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 743, Misc. DEBARR *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, *Eugene Krasicky*, Solicitor General, *Robert Weinbaum* and *George Mason*, Assistant Attorneys General, for respondent.

No. 849, Misc. TILLERY *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: See 294 F. 2d 12.

No. 951, Misc. VERDON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for the United States. Reported below: 296 F. 2d 549.

No. 964, Misc. THOMPSON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *F. W. Durnan* for petitioner. *Bruce T. Rinker* for respondent. Reported below: 58 Wash. 2d 598, 364 P. 2d 527.

No. 970, Misc. Bosco *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Isidore Dollinger* and *Walter E. Dillon* for respondent.

No. 984, Misc. SULLIVAN *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Edsel W. Haws*, Deputy Attorney General, for respondents.

No. 986, Misc. MORRISON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, for respondent.

No. 1012, Misc. FROST *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 111 U. S. App. D. C. 414, 298 F. 2d 328.

No. 1027, Misc. SAWYER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 297 F. 2d 535.

No. 1039, Misc. THORNTON ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se.* *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 112 U. S. App. D. C. 57, 299 F. 2d 438.

No. 1097, Misc. MIDDLETON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1143, Misc. SIMPSON *v.* UNITED STATES;
No. 1156, Misc. WILLIAMS *v.* UNITED STATES; and
No. 1243, Misc. TURBERVILLE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 112 U. S. App. D. C. 400, 303 F. 2d 411.

No. 1032, Misc. OWENS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 1095, Misc. ROADHS *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *J. F. Brauer*, Assistant Attorney General, for respondent.

No. 1114, Misc. WRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Supreme Court of Washington. Certiorari denied. Petitioner *pro se*. *John J. O'Connell*, Attorney General of Washington, and *Basil L. Badley*, Assistant Attorney General, for respondents.

No. 1131, Misc. LAWRENSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 298 F. 2d 880.

No. 1139, Misc. THOMAS *v.* WIMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent.

No. 1142, Misc. RACINOWSKI *v.* PATE, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 1147, Misc. MATHIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Dale M. Quillen* for petitioner. *Solicitor General Cox* for the United States. Reported below: 298 F. 2d 790.

No. 1148, Misc. PANARELLO *v.* RHODE ISLAND. Supreme Court of Rhode Island. Certiorari denied.

No. 1149, Misc. WRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Supreme Court of Washington. Certiorari denied.

No. 1150, Misc. MEIKLE *v.* NEW YORK. Court of General Sessions of New York County, New York. Certiorari denied.

No. 1151, Misc. REED *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1152, Misc. BOYES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 298 F. 2d 828.

No. 1154, Misc. MCGANN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1155, Misc. BOLDT *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States.

No. 1159, Misc. MORRISON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1160, Misc. LANHAM *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied.

No. 1162, Misc. GRIFFIN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 1163, Misc. STRICKLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 295 F. 2d 186.

No. 1165, Misc. MONTGOMERY *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 1166, Misc. WATTERS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Wilson Bucher* for respondent.

No. 1167, Misc. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 297 F. 2d 342.

No. 1169, Misc. FLETCHER *v.* RAINES, WARDEN. Oklahoma Criminal Court of Appeals. Certiorari denied.

No. 1174, Misc. GEORGE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 1175, Misc. SPANNER *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 1173, Misc. SPADY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1176, Misc. GAUDET *v.* COWEN ET AL. C. A. 5th Cir. Certiorari denied. *Cecil M. Burglass, Jr.* for petitioner. Reported below: 297 F. 2d 227.

No. 1178, Misc. GARCIA *v.* TURNER. C. A. 10th Cir. Certiorari denied. *George H. Searle* for petitioner. *A. Pratt Kesler,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for respondent. Reported below: 297 F. 2d 881.

No. 1181, Misc. DELLA UNIVERSITA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 298 F. 2d 365.

No. 1182, Misc. BAGLEY *v.* WILSON, CORRECTIONAL SUPERINTENDENT, ET AL. Supreme Court of California. Certiorari denied.

No. 1185, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 1186, Misc. SMITH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1187, Misc. JOHNSON *v.* ZIMMER ET AL. Supreme Court of New York, Kings County. Certiorari denied.

No. 1189, Misc. CRISWELL *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 1190, Misc. HALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1193, Misc. TUCKER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1194, Misc. BOOTH *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1195, Misc. BRONSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1197, Misc. PATTERSON *v.* ALABAMA ET AL. Supreme Court of Alabama. Certiorari denied.

No. 1198, Misc. REED *v.* SIGLER, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 1201, Misc. BRADEY *v.* RIBICOFF, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE. C. A. 4th Cir. Certiorari denied. *John Bolt Culbertson* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *David L. Rose* for respondent. Reported below: 298 F. 2d 855.

No. 1204, Misc. BROOKS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

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No. 1202, Misc. MITCHELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 297 F. 2d 407.

No. 1205, Misc. JACEK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 298 F. 2d 429.

No. 1207, Misc. BISNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 299 F. 2d 711.

No. 1208, Misc. DUNCAN *v.* CARTER, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied. *S. Ward Sullivan* and *Arthur Warner* for petitioner. *Stanley Mosk*, Attorney General of California, and *William E. James*, Assistant Attorney General, for respondent. Reported below: 299 F. 2d 179.

No. 1210, Misc. DEVINE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1211, Misc. COFIELD *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, *James L. Screws*, Assistant Attorney General, and *Winston Huddleston*, Special Assistant Attorney General, for respondent. Reported below: —— Ala. ——, 136 So. 2d 904.

No. 1209, Misc. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 298 F. 2d 108.

No. 1212, Misc. CRUZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1214, Misc. ROWLAND *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 1215, Misc. DEARHART *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1216, Misc. O'LEARY *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 111 U. S. App. D. C. 357, 297 F. 2d 434.

No. 1217, Misc. BOYLE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 1218, Misc. HUGHES, DOING BUSINESS AS HUGHES TRAILERS, *v.* L. B. SMITH, INC. C. A. 3d Cir. Certiorari denied. *William J. Ruano* for petitioner.

No. 1220, Misc. SMITH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1221, Misc. BRUNSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1222, Misc. ADKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 298 F. 2d 842.

No. 1223, Misc. SULLIVAN, ADMINISTRATRIX, ET AL. *v.* TREASURER OF SILVER BOW COUNTY, MONTANA, ET AL. Supreme Court of Montana. Certiorari denied.

No. 1225, Misc. LOPEZ *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1226, Misc. RUIZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1227, Misc. WEIRES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Joseph A. Mogavero, Jr.* for respondent.

No. 1228, Misc. BEEBE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1229, Misc. PAULSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1230, Misc. MILLER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1231, Misc. SMITH *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 1232, Misc. SCOTT *v.* THROSBY. Supreme Court of California. Certiorari denied.

No. 1233, Misc. HUFFMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 297 F. 2d 754.

No. 1236, Misc. ARRINGTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1237, Misc. HOLSCHER *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied.

No. 1239, Misc. WILLIS *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 1240, Misc. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 1241, Misc. SARDO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1245, Misc. McTIER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1248, Misc. CHAPIN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1249, Misc. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 299 F. 2d 574.

No. 1251, Misc. GRAVES *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *T. Emmett McKenzie* for petitioner.

No. 1253, Misc. NELSON *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 1254, Misc. DAVIS ET AL. *v.* GOVERNMENT EMPLOYEES INSURANCE CO. ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. *Elmer B. Gower* for petitioners. *Robert J. Dimond* for respondents.

No. 1255, Misc. IN RE BRINSON. Supreme Court of California. Certiorari denied.

No. 1256, Misc. HASSETT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1259, Misc. SCOTT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 1260, Misc. HARDEN *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 1264, Misc. GRUBBS *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Third Judicial Department. Certiorari denied.

No. 1265, Misc. JACKSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1266, Misc. BROWN *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1267, Misc. KOPTIK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 300 F. 2d 19.

No. 1268, Misc. BROWN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 112 U. S. App. D. C. 87, 299 F. 2d 468.

No. 1270, Misc. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1275, Misc. SULLIVAN *v.* OREGON. Supreme Court of Oregon. Certiorari denied.

No. 1276, Misc. RICHTER *v.* RIEDMAN, WARDEN. Supreme Court of North Dakota. Certiorari denied.

No. 1278, Misc. HOMCHAK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1280, Misc. THOMPSON *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1281, Misc. HUNT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1284, Misc. BROWN *v.* PURCELL, WARDEN, ET AL. Supreme Court of Iowa. Certiorari denied.

No. 1285, Misc. CEDILLO *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1286, Misc. MCLEAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1289, Misc. HALL *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1290, Misc. JONES *v.* MISSOURI ET AL. Supreme Court of Missouri. Certiorari denied.

No. 1291, Misc. HAMILTON *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1293, Misc. MARSHALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 299 F. 2d 141.

No. 1294, Misc. SOTO *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1295, Misc. GERALD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1297, Misc. WRIGHT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1302, Misc. KRAWITZ *v.* MCSHANE, U. S. MARSHAL, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondents. Reported below: 111 U. S. App. D. C. 359, 297 F. 2d 436.

No. 1303, Misc. MORRIS *v.* ROUSOS. Supreme Court of Texas. Certiorari denied.

No. 1304, Misc. MORGAN *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 1305, Misc. DECLARA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner.

No. 1310, Misc. GAGER *v.* SEIDEL, DOING BUSINESS AS BOB SEIDEL'S RESTAURANT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondents. Reported below: 112 U. S. App. D. C. 135, 300 F. 2d 727.

No. 1311, Misc. ERNST *v.* YEAGER. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Norman Heine* for respondent.

No. 1312, Misc. MANGUM *v.* RANDALL. Supreme Court of North Carolina. Certiorari denied.

No. 1313, Misc. ADAMS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1314, Misc. MARTIN *v.* WEST VIRGINIA. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1318, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1319, Misc. MORRELL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Jay A. Darwin* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for the United States. Reported below: 297 F. 2d 662.

No. 1320, Misc. LACRUE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1321, Misc. OYLER *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 1322, Misc. OLIVER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 299 F. 2d 352.

No. 1323, Misc. WOODSON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1328, Misc. FLETCHER *v.* CAVELL, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 1329, Misc. ANDREWS *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied.

No. 1330, Misc. NADILE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1335, Misc. LEWIS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1333, Misc. CASE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *T. W. Bruton*, Attorney General of North Carolina, and *Harry W. McGalliard*, Assistant Attorney General, for respondent.

No. 1337, Misc. BURELL *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *T. W. Bruton*, Attorney General of North Carolina, and *Harry W. McGalliard*, Assistant Attorney General, for respondent.

No. 1338, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1339, Misc. NUNES *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 1340, Misc. SPECHT *v.* TINSLEY, WARDEN. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *J. F. Brauer*, Assistant Attorney General, for respondent.

No. 1342, Misc. PUCKETT *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 1346, Misc. BARNETT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1347, Misc. MARION *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1351, Misc. GOODSON *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1353, Misc. BLOCKER *v.* CALIFORNIA ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 1359, Misc. BANKS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 1360, Misc. BARBER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1389, Misc. PEREIRA ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Rudolph Stand, John Cardone* and *Oscar Gonzalez-Suarez* for petitioners. *H. Richard Uviller* for respondent.

No. 1402, Misc. HEADLEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *H. Richard Uviller* for respondent.

No. 1410, Misc. LAWRENSON *v.* REID, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 1413, Misc. LUSTERINO *v.* NEW YORK. Appellate Division of the Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *Benj. J. Jacobson* for respondent.

No. 1420, Misc. DAWSON *v.* BOMAR, WARDEN. Supreme Court of Tennessee, Middle Division. Certiorari denied. *George E. Barrett* for petitioner.

No. 1431, Misc. IN RE SNEBOLD. Supreme Court of California. Certiorari denied.

No. 1445, Misc. ANDERSON *v.* WIMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent. Reported below: —— Ala. ——, 139 So. 2d 352.

No. 709, Misc. MILLER *v.* DISTRICT COURT OF IOWA IN AND FOR LEE COUNTY. Petition for writ of certiorari to the Supreme Court of Iowa denied in light of the representations of the State Attorney General as to the adequacy of state remedies. Petitioner *pro se*. *Evan Hultman*, Attorney General of Iowa, for respondent.

No. 867, Misc. ROGERS *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. The motion of *G. Wray Gill* and *Gerard H. Schreiber* for leave to withdraw appearances as counsel for petitioner is granted. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Scallan E. Walsh*, Assistant Attorney General, for respondent.

No. 1118, Misc. EVERETT *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Edward S. Silver* and *Frank Di Lalla* for respondent. Reported below: 10 N. Y. 2d 500, 180 N. E. 2d 556.

No. 990, Misc. MILLER *v.* MILLER. The motion to correct the docket and the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit are denied. Reported below: 296 F. 2d 283.

No. 880, Misc. TITMUS *v.* TINSLEY, WARDEN. Petition for writ of certiorari to the Supreme Court of Colorado denied on the representations of the State Attorney General that the courts of Colorado will consider and pass upon a proper petition for furnishing a record without the prepayment of costs. Petitioner *pro se*. *Duke W. Dunbar*, Attorney General of Colorado, *Frank E. Hickey*, Deputy Attorney General, and *J. F. Brauer*, Assistant Attorney General, for respondent.

No. 1001, Misc. JACKSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondent.

No. 1079, Misc. SIMCOX *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Robert E. Hannon* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *David Rubin* for respondent.

No. 1038, Misc. MILLER *v.* PLEASURE, HOSPITAL SUPERINTENDENT. The motions to correct the docket and to strike the respondent's brief are denied. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Irving Galt*, Assistant Solicitor General, *Philip Watson* and *John J. O'Grady*, Assistant Attorneys General, for respondent. Reported below: 296 F. 2d 283.

No. 1252, Misc. MORGAN *v.* CALIFORNIA. Superior Court of California, County of Kern. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *William A. Carver* for petitioner.

Rehearing Denied.

No. 394. GEAGAN ET AL. *v.* GAVIN, CORRECTIONAL SUPERINTENDENT, *ante*, p. 903;

No. 493. ENOCHS, DISTRICT DIRECTOR OF INTERNAL REVENUE, *v.* WILLIAMS PACKING & NAVIGATION CO., INC., *ante*, p. 1;

No. 773. TAYLOR ET AL. *v.* LOUISIANA, *ante*, p. 154;

No. 835. WOOTEN ET AL. *v.* TEXAS, 369 U. S. 885;

No. 852. WOODARD ET AL., DOING BUSINESS AS WOODARD MOTOR CO., *v.* GENERAL MOTORS CORP., 369 U. S. 887;

No. 802, Misc. BURTON *v.* FLORIDA, *ante*, p. 905; and

No. 828, Misc. BANKS *v.* MADIGAN, WARDEN, *ante*, p. 905. Petitions for rehearing denied.

No. 40. BECK *v.* WASHINGTON, 369 U. S. 541;

No. 241. SUNKIST GROWERS, INC., ET AL. *v.* WINCKLER & SMITH CITRUS PRODUCTS CO. ET AL., *ante*, p. 19;

No. 283. SALEM *v.* UNITED STATES LINES CO., *ante*, p. 31;

No. 323. VAUGHAN *v.* ATKINSON ET AL., 369 U. S. 527;

No. 475. GALLEGOS *v.* COLORADO, *ante*, p. 49; and

No. 667. RICHARDSON, EXECUTRIX, ET AL. *v.* MOORE-MCCORMACK LINES, INC., 368 U. S. 989. Petitions for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of these applications.

No. 46. HUTCHESON *v.* UNITED STATES, 369 U. S. 599. Petition for rehearing denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this application.

No. 109. THOMAS ET UX. *v.* PATTERSON, DISTRICT DIRECTOR OF INTERNAL REVENUE, 368 U. S. 837. The motion for leave to file petition for rehearing is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this application.

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STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1959, 1960, AND 1961

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1959	1960	1961	1959	1960	1961	1959	1960	1961	1959	1960	1961
Number of cases on dockets	12	12	13	1, 047	1, 046	1, 062	1, 119	1, 255	1, 510	2, 178	2, 313	2, 585
Number disposed of during terms	0	1	0	860	887	860	962	1, 040	1, 297	1, 822	1, 928	2, 157
Number remaining on dockets	12	11	13	187	159	202	157	215	213	356	385	428

	TERMS		
	1959	1960	1961
Distribution of cases disposed of during terms:			
Original cases	0	1	0
Appellate cases on merits	215	259	195
Petitions for certiorari	645	628	665
Miscellaneous docket applications	962	1, 040	1, 297

	TERMS		
	1959	1960	1961
Distribution of cases remaining on dockets:			
Original cases	12	11	13
Appellate cases on merits	116	85	118
Petitions for certiorari	71	74	84
Miscellaneous docket applications	157	215	213

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JUDGES. See **Courts; Procedure,** 4.

JUDICIAL POWER. See **Constitutional Law,** III; **Courts.**

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JURISDICTION. See also **Constitutional Law**, II, 4; **Courts**; **Labor**, 2; **Procedure**; **Taxation**, 2–4.

Supreme Court—Direct appeal from District Court—Antitrust case—"Final" judgment.—Judgment of District Court enjoining appellant from having or acquiring any interest in competing corporation, requiring divestiture, and ordering appellant to propose plan for carrying out Court's order of divestiture was "final" judgment within meaning of § 2 of Expediting Act, and Supreme Court had jurisdiction of direct appeal. Brown Shoe Co. v. United States, p. 294.

JUVENILES. See **Constitutional Law**, II, 2.

LABOR. See also **Admiralty**, 1–3; **Taxation**, 2.

1. *National Labor Relations Act—Right of nonunion employees to act in concert—Walkout because of cold.*—Discharge of nonunion employees for walking off job together because shop was "too cold" violated § 8 (a) (1) by interfering with their right under § 7 to act in concert for mutual aid or protection; rule against leaving work without permission was not justifiable "cause" for discharge under § 10 (c). Labor Board v. Washington Aluminum Co., p. 9.

2. *National Labor Relations Act—Dispute between shipowners and unions of marine engineers—Jurisdiction of state court to enjoin picketing.*—In suit by shipowners to enjoin picketing and other protected activities by unions of marine engineers, dispute was arguably within jurisdiction of National Labor Relations Board, and state court was precluded from exercising jurisdiction, notwithstanding claim that only "supervisory" personnel were involved. Marine Engineers v. Interlake Steamship Co., p. 173.

3. *Labor Management Relations Act—Norris-LaGuardia Act—Suit by employer to enjoin strike in violation of agreement.*—Notwithstanding § 301 of Labor Management Relations Act, 1947, § 4 of Norris-LaGuardia Act bars injunction against strike, picketing, etc., by union and its officers and members in violation of collective bargaining agreement. Sinclair Refining Co. v. Atkinson, p. 195.

4. *Labor Management Relations Act—Suit by employer for damages for strike in violation of agreement—Arbitration.*—Suit by employer under § 301 of Labor Management Relations Act to recover damages for strike or work stoppage in violation of collective bargaining agreement stated cause of action against unions but not against individual members; contract did not bind employer to arbitrate its claim against union for damages. Atkinson v. Sinclair Refining Co., p. 238.

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5. *Labor Management Relations Act—Suit by employer for damages for strike in violation of agreement—Arbitration.*—Employer's claim against union for damages for strike in violation of collective bargaining agreement was within compulsory arbitration provisions of agreement, and suit for damages under § 301 of Labor Management Relations Act was properly stayed pending completion of arbitration. Drake Bakeries v. Bakery Workers, p. 254.

LAWYERS. See **Constitutional Law**, II, 2; **Contempt**, 1; **Procedure**, 5; **Taxation**, 1.

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MARINE ENGINEERS. See **Labor**, 2.

McCARRAN-FERGUSON ACT. See **Taxation**, 3.

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MINNESOTA. See **Labor**, 2.

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NARCOTICS. See **Constitutional Law**, I.

NATIONAL LABOR RELATIONS ACT. See **Labor**, 1–2.

NEGLIGENCE. See **Admiralty**, 1–3; **Procedure**, 5.

NEGROES. See **Constitutional Law**, II, 3; V.

NEW TRIAL. See **Admiralty**, 1; **Antitrust Acts**, 5.

NEW YORK. See **Constitutional Law**, II, 4; III.

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NUDITY. See **Postal Service.**

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OBSTRUCTION OF JUSTICE. See **Contempt**, 1.

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PERSONAL INJURIES. See **Admiralty**, 1–3; **Procedure**, 5.

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POLITICS. See **Constitutional Law**, III; V.

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Mails—"Obscene" material—Magazines containing pictures of nude or nearly nude men.—Administrative order of Post Office Department barring from mails as "obscene" under 18 U. S. C. § 1461 magazines containing pictures of nude or nearly nude men and advertisements offering similar pictures for sale, all of which appealed almost exclusively to homosexuals, held invalid. Manual Enterprises v. Day, p. 478.

PRAYERS. See **Constitutional Law**, IV.

PRICE DISCRIMINATION. See **Antitrust Acts**, 2.

PROCEDURE. See also **Admiralty**, 1–3; **Antitrust Acts**, 3, 5; **Armed Forces**; **Constitutional Law**, II, 1–4; V; **Contempt**; **Courts**; **Jurisdiction**; **Labor**, 2–5; **Taxation**, 2–4.

1. *Supreme Court—Certiorari—Plain error not briefed or argued.*—When indictment for contempt of Congress was defective under *Russell* v. *United States*, 369 U. S. 749, District Court denied timely motion to dismiss it, and issue was not presented to Court of Appeals or briefed or argued in Supreme Court, the latter could, at its option, notice such plain error and reverse judgment sustaining conviction. Silber v. United States, p. 717.

2. *Supreme Court—Certiorari—Review of no importance except to litigants.*—When it appeared that outcome of suit for refund of income taxes depended upon facts and review would be of importance to no one except litigants, writ of certiorari dismissed as improvidently granted. Rudolph v. United States, p. 269.

3. *Supreme Court—Certiorari—Constitutional issues not presented by record.*—When petitioner claimed that use of intercepted conversation with brother in jail violated his constitutional rights and invalidated his conviction in state court for refusal to answer questions of state legislative investigating committee, but record showed that two of the questions were not related to intercepted conversation and refusal to answer them was sufficient to support judgment, his constitutional claim was not presented by the record. Lanza v. New York, p. 139.

4. *District Courts—Suit challenging state statute as conflicting with Federal Constitution—Need for three-judge court.*—Three-judge court should have been convened under 28 U. S. C. §§ 2281, 2284 to hear and determine suit to enjoin enforcement of state statute because

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of conflict with Federal Constitution. Idlewild Bon Voyage Liquor Corp. v. Epstein, p. 713.

5. *District Courts—Dismissal of suit for want of prosecution—Sua sponte and without notice.*—District Court, acting *sua sponte* and without prior notice, had inherent right to dismiss for want of prosecution long-pending personal injury suit against railroad based on diversity of citizenship; right not restricted by Federal Rule of Civil Procedure 41 (b) to cases in which defendant moves for dismissal; plaintiff bound by his lawyer's conduct. Link v. Wabash R. Co., p. 626.

PROPERTY SETTLEMENTS. See **Taxation,** 1.

PUBLIC SCHOOLS. See **Constitutional Law,** IV.

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1. *Income tax—Transfers of stock—Husband to divorced wife in property settlement—Deductibility of fee paid wife's attorney.*—Transfer by taxpayer in Delaware to divorced wife, in return for release of her marital claims, of stock which had appreciated in market value and which was solely property of the husband, was taxable event under Internal Revenue Code of 1954 and not division of property between co-owners; husband not entitled to deduct fee paid to wife's attorney for advice about tax consequences of transaction. United States v. Davis, p. 65.

2. *Social security and unemployment taxes—Suit to enjoin collection.*—A suit to enjoin collection of social security and unemployment taxes was barred by § 7421 (a) of the Internal Revenue Code of 1954, even though District Court found that they were not, in fact, payable and that their collection would destroy plaintiff's business. Enochs v. Williams Packing & Navigation Co., p. 1.

3. *State taxes—Wholly out-of-state insurance transactions covering property in State.*—In view of history and language of McCarran-Ferguson Act, a State may not tax wholly out-of-state insurance transactions covering property within the State. State Board of Insurance v. Todd Shipyards Corp., p. 451.

4. *State taxes—Personal property—Situs—Freight cars.*—Pennsylvania could tax all freight cars, wherever located, owned by railroad incorporated and located in Pennsylvania, except cars proved to have tax situs in another State. Central R. Co. v. Pennsylvania, p. 607.

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2. *"Concerted activities for the purpose of . . . mutual aid or protection."*—National Labor Relations Act, § 7. Labor Board v. Washington Aluminum Co., p. 9.

3. *"Discharged for cause."*—National Labor Relations Act, § 10 (c). Labor Board v. Washington Aluminum Co., p. 9.

4. *"Due allowance for differences in the cost."*—Clayton Act, § 2 (a). United States v. Borden Co., p. 460.

5. *"Final judgment."*—Expediting Act. Brown Shoe Co. v. United States, p. 294.

6. *"Forges."*—18 U. S. C. § 495. Gilbert v. United States, p. 650.

7. *"Labor dispute."*—Norris-LaGuardia Act, § 4. Sinclair Refining Co. v. Atkinson, p. 195.

8. *"Labor dispute."*—National Labor Relations Act, § 2 (a). Labor Board v. Washington Aluminum Co., p. 9.

9. *"Labor organization."*—National Labor Relations Act, § 8 (b). Marine Engineers v. Interlake Steamship Co., p. 173.

10. *"Monopolize."*—Sherman Act, § 2. Continental Ore Co. v. Union Carbide Corp., p. 690.

11. *"Obscene."*—18 U. S. C. § 1461. Manual Enterprises v. Day, p. 478.

12. *"Obstruct the administration of justice."*—18 U. S. C. § 401. In re McConnell, p. 230.

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15. *"Tend to create a monopoly."*—Clayton Act, § 7. Brown Shoe Co. v. United States, p. 294.

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